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EDITOR'S NOTE

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No. 86-5963-CSY
Status: GRANTED

Title: Ray Taylor, Petitioner
v.
Illinois

Docketed:
December 1, 1986

Court: Appellate Court of Illinois,
First District

Counsel for petitioner: Cunningham, Richard E.

Counsel for respondent: Gainer Jr., Thomas V., Wine-
Banks, Jill, Shabat, Michael

Entry	Date	Note	Proceedings and Orders
1	Dec 1 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 2 1987		Brief of respondent Illinois in opposition filed.
4	Jan 8 1987		DISTRIBUTED. January 23, 1987
6	Jan 27 1987		Petition GRANTED. limited to Question 1 presented by the petition. *****
8	Feb 17 1987		Order extending time to file brief of petitioner on the merits until April 13, 1987.
9	Feb 19 1987		Record filed.
10	Mar 28 1987		Lodging received.
11	Apr 2 1987		Joint appendix filed.
12	Apr 8 1987		Brief of petitioner Ray Taylor filed.
14	May 4 1987		Order extending time to file brief of respondent on the merits until July 6, 1987.
15	Jul 6 1987		Brief amicus curiae of United States filed.
16	Jul 6 1987		Brief of respondent Illinois filed.
17	Jul 20 1987		SET FOR ARGUMENT. Wednesday, October 7, 1987. (4th case).
18	Jul 27 1987		CIRCULATED.
20	Sep 30 1987	X	Reply brief of petitioner Ray Taylor filed.
21	Oct 7 1987		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

83-5963

ORIGINAL

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

RAY TAYLOR,

Petitioner

vs.

THE PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF
ILLINOIS

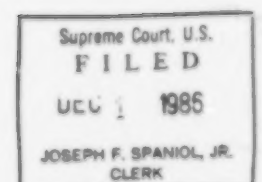
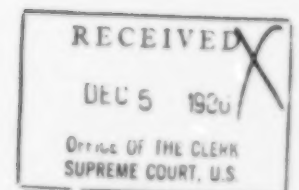
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QUESTIONS PRESENTED FOR REVIEW

1. When, if ever, will the Sixth Amendment allow a State to exclude a material defense witness as a sanction for a statutory discovery violation?

2. Is a defense attorney constitutionally ineffective where, in a close credibility contest, his failure to comply with discovery rules deprives the accused of his Sixth Amendment right to present witnesses and his failure to impeach four prosecution witnesses with their prior convictions deprives the accused of his Sixth Amendment right to confront his accusers?

TABLE OF CONTENTS

	<u>Page</u>
Introduction.....	1
Opinion Below.....	1
Statement of Jurisdiction.....	1
Constitutional Provisions Involved.....	2
Statement of the Case.....	2
Preservation of the Federal Constitutional Claim.	3
Reasons for granting the Writ.....	6

I. THE STATE COURTS' EXCLUSION OF A DEFENSE WITNESS, SOLELY AS A SANCTION FOR A STATUTORY DISCOVERY VIOLATION WHICH CAUSED NO PREJUDICE TO THE STATE, WAS PROHIBITED BY THE SIXTH AMENDMENT RIGHT OF THE PETITIONER TO PRESENT WITNESSES..... 6

II. DEFENSE COUNSEL'S FAILURE TO COMPLY WITH DISCOVERY RULES WHICH RESULTED IN THE EXCLUSION OF A MATERIAL DEFENSE WITNESS AND HIS FAILURE TO IMPEACH ANY OF THE FOUR STATE WITNESSES WITH THEIR PRIOR CONVICTIONS SO UNDERMINED THE ADVERSARIAL PROCESS IN A CASE WHERE CREDIBILITY OF THE WITNESSES WAS THE SOLE ISSUE THAT THE STATE COURT'S SANCTIONING OF SUCH A TRIAL MUST BE OVERTURNED..... 9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Lane v. Enoch</u> , ___ U.S. ___, 89 L.Ed 2d 588 (1986).....	8
<u>Smith v. Jago</u> , 470 U.S. ___, 84 L. Ed 2d 836 (1985).....	8
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	10,11
<u>Taliaferro v. Maryland</u> , 461 U.S. 948 (1983).....	8
<u>Wardius v. Oregon</u> , 412 U.S. 470 (1973).....	7
<u>Williams v. Florida</u> , 399 U.S. 78 (1970).....	7
<u>Fendler v. Goldsmith</u> , 728 F. 2d 1181 (9th Cir., 1984).....	8
<u>Ronson v. Commissioner of Correction</u> , 684 F. 2d 176 (2nd Cir., 1979).....	7
<u>United States v. Davis</u> , 639 F. 2d 239 (5th Cir., 1981)....	8
<u>United States ex rel. Enoch v. Hartigan</u> , 768 F. 2d 161 (7th Cir. 1986).....	7
<u>Commonwealth v. Bulard</u> , 451 A. 2d 760 (Pa. Super, 1983)...	9
<u>Commonwealth v. Simmler</u> , 467 A. 2d 355 (Pa. Super, 1983)..	9
<u>People v. Nickson</u> , 327 N.W. 2d 333 (Mich. App., 1982).....	10
<u>State v. Taliaferro</u> , 295 Md 376, 456 A. 2d 29 (1983).....	7
Ill. Rev. Stats., 1983, Ch. 110A, Sec. 413(d)(i).....	6
Ill. Rev. Stats., 1983, Ch. 110A, Sec. 415(g)(i).....	7

No.

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THE PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF
ILLINOIS

INTRODUCTION

Petitioner Ray Taylor respectfully prays that a writ of certiorari issue to review the decision of the Appellate Court of Illinois affirming his conviction of attempt murder and sentence of ten years.

OPINION BELOW

The opinion of the Appellate Court of Illinois is published at 141 Ill. App. 3d 839, 491 N.E. 2d 3 (1986). A copy of the opinion is attached as Appendix A. A copy of the order of the Supreme Court of Illinois denying Leave to Appeal is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Appellate Court of Illinois was filed on February 10, 1986. A timely petition for rehearing was filed and denied on April 4, 1986. A timely Petition for Leave to Appeal was filed in the Illinois Supreme Court and was denied on October 2, 1986. This petition is filed within 60 days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 6, 1981, Jack Bridges was shot during a street altercation near 64th and Kenwood Street in Chicago. Although Bridges allegedly told police on the night of the shooting that the petitioner, Ray Taylor, was the culprit (R. 148) and although Ray Taylor lived openly with his family in Chicago after the incident (R. 414-21) no warrant was ever issued for Taylor's arrest and he was never charged for the incident until over 22 months later, when he was indicted for attempt murder on June 14, 1983. (C. 437) The petitioner was tried by a jury.

The trial presented the jury with a credibility question as to who shot Jack Bridges. It was undisputed that Bridges was shot during a physical confrontation between Bridges and his relatives on one side, and the petitioner and his friends on the other. The

State's theory of the case, presented through the testimony of Jack Bridges, his brother Maurice Bethany, his sister Jacqueline Jones, and another relative, Charles Trotter, was that, during a fight in which four friends of the petitioner were beating Jack Bridges, the petitioner pulled a gun, fired it "point blank" at Maurice Bethany but missed, and then fired four more shots, the last of which hit Jack Bridges. (R. 144-147) Bridges and Bethany denied that either of them possessed a gun on the night of the incident. (R. 133, 193)

The defense presented the eye-witness testimony of two sisters, Hattie and Regina Algood, who were sitting on church steps in front of where the altercation occurred. They denied that Ray Taylor had a gun. They testified that as Bridges was being beaten by Ray Taylor and his friends, Maurice Bethany approached with a gun and, in an attempt to defend his brother, fired three shots, one of which hit Jack Bridges. (R. 282-96, 303-16)

After two of the five state witnesses had testified and the day before the defense was called upon to present its case, petitioner's counsel moved to amend his list of witnesses to include Alfred Wormly and Pam Berkhalter. (R. 205) In response to the court's inquiry as to why the witnesses were not listed before trial, defense counsel stated that the petitioner had told him of Alfred Wormly some time ago but that the petitioner had been unable to locate him. (R. 205) The court ordered that the witnesses be produced for examination the following day to determine if they would be allowed to testify. (R. 206)

The following day, defense counsel informed the court that Alfred Wormly was present to testify. The prosecution objected. (R. 210-12) Defense counsel responded that there had been numerous fires in the area in the almost three years since the incident, so that "it has been a traumatic experience for myself to even locate the witnesses. A lot of them have moved and left no forwarding addresses." (R. 212)

The trial judge noted that counsel could have listed the name of the witness before trial with address unknown. He found counsel's behavior "inexcusable and I have had, for the record, so many violations of discovery rules by the defense in the last few trials that it is unbelievable." (R. 212) The court ordered that Mr. Wormly testify out of the presence of the jury as an offer of proof.

Alfred Wormly testified that he lived in the neighborhood of the incident. He was present on Jacqueline Jones' porch shortly before the shooting and he saw Jack Bridges in possession of a blanket containing two pistols. He heard Bridges and his relatives discussing plans to go "after Ray [the petitioner] and the other people." (R. 215-7)

On cross-examination by the prosecutor, Mr. Wormly stated that he had moved out of the neighborhood shortly after the incident and that he had only recently moved back into the neighborhood. (R. 219) Defense counsel first contacted him to testify the week before trial. (R. 220)

The court then questioned Mr. Wormly and determined that defense counsel had visited him a week before trial and given him a subpoena. (R. 220-21) Wormly produced the subpoena for the court. (R. 222)

After the offer of proof, the State objected that Mr. Van had lied to the court when he originally claimed that he did not have Mr. Wormly's address. (R. 226-227) The court ruled that Mr. Wormly would not be permitted to testify because this was "a blatant violation of the discovery rules, willful violation of the rules." The court stated that defense attorneys in his courtroom had violated discovery rules in the last 3 or 4 cases and "I am going to put a stop to it and this is one way to do so." (R. 230) The judge said that he was considering reporting counsel to the disciplinary commission because "this is the type of violation that should not exist". (R. 230-1)

After the court had ruled, the State presented its final three witnesses, and the defense presented its two witnesses. No physical evidence was presented to corroborate either sides' version of who did the shooting. After the jurors retired for their deliberations they requested and received from the trial judge the testimony of the State's two key witnesses, Jack Bridges and Maurice Bethany. (R. 396-401) After further deliberations, the jury eventually returned a guilty verdict. (R. 402-4)

The jury deliberated and returned its verdict without considering the effect of prior convictions on the testimony of the four State witnesses. Jack Bridges had an aggravated battery conviction for which he served 18 months in the penitentiary. Maurice Bethany had a prior theft conviction for which he was placed on probation in 1978. Jacqueline Jones had three prior theft convictions for which she had received probation in the last 3 to 5 years. Although the prosecution revealed these convictions to defense counsel prior to trial (R. 120-1) and conceded that they were admissible (R. 129), defense counsel never attempted to introduce this evidence. In addition, the State tendered an unspecified provable conviction of Charles Trotter just before he testified but defense counsel failed to introduce it. (R. 232) The Court precluded defense counsel from mentioning any of the prior convictions of the State witnesses in closing arguments because no evidence of these convictions had been introduced by the defense at trial. (R. 336-8)

The two defense witnesses who testified did not have prior convictions, nor did the defense witness who was precluded from testifying have any prior convictions. (R. 218-9)

PRESERVATION OF THE FEDERAL CONSTITUTIONAL CLAIMS

Mr. Taylor took an exception to the trial court's ruling that Alfred Wormly be excluded as a witness and he cited this error as a due process violation in his motion for a new trial. (C. 521-2)

The exclusion of Wormly's testimony was raised as a violation of the Sixth and Fourteenth Amendments in Mr. Taylor's appeal to the Illinois Appellate Court. The Appellate Court did not directly address the constitutional claim in its opinion. People v. Taylor, 141 Ill. App. 3d 839, 844-5 (1986). A rehearing petition pointing this deficiency out was summarily denied. This constitutional claim was next raised in Mr. Taylor's petition for leave to appeal to the Illinois Supreme Court. That petition was also denied.

The denial of Mr. Taylor's Sixth and Fourteenth Amendment rights to the effective assistance of trial counsel was raised in his appeal to the Illinois Appellate Court, which ruled on the merits of the issue. People v. Taylor, 144 Ill. App. 3d 839, 846-7 (1988). The claim was next presented to the Illinois Supreme Court in a petition for leave to appeal. The petition was denied.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURTS' EXCLUSION OF A DEFENSE WITNESS, SOLELY AS A SANCTION FOR A STATUTORY DISCOVERY VIOLATION WHICH CAUSED NO PREJUDICE TO THE STATE, WAS PROHIBITED BY THE SIXTH AMENDMENT RIGHT OF THE PETITIONER TO PRESENT WITNESSES.

This Court has twice expressly reserved judgment on the question of whether the Sixth Amendment allows a State to exclude a defense witness as a means to enforce its discovery rules. Wardius v. Oregon, 412 U.S. 470, 472, n. 4 (1973); Williams v. Florida, 399 U.S. 78, 83, n. 14 (1970). The instant case squarely presents this important question.

By failing to provide the witness' name until the first day of trial, defense counsel here clearly violated an Illinois discovery rule which required that he list the names and addresses of persons he intends to call as witnesses. Ill. Rev. Stats., 1983, Ch. 110A, Sec. 413(d)(1). Defense counsel had served the witness with a subpoena a week before trial and thus had ample opportunity to comply with this rule.¹

¹ The Illinois Appellate Court opinion asserts that petitioner's appellate brief argued "that his counsel was

(Footnote Cont'd)

The State prosecutor presented no claim that he was prejudiced by the discovery violation. The prosecution was made aware of the witness the day before the defense was called upon to present its case. The witness testified outside the presence of the jury as an offer of proof before the trial court ruled on the witness' standing to testify. The prosecution was given broad leeway to cross-examine the witness on the substance of his testimony. (R. 214-26) Thus, the prosecution had been given a unique discovery tool to utilize in the event that the witness was allowed to testify before the jury. At any rate, the prosecution never claimed, in either the trial court or on appeal, that the discovery violation prejudiced its case.

The trial court excluded the defense witness' testimony pursuant to a discovery rule which permits exclusion as a sanction. Ill. Rev. Stats., 1983, ch. 110A, Sec. 415(g)(1). In doing so, the court pointed to no prejudice incurred by the State, but rather made it clear that the sanction was being imposed in order to ensure that the defense bar would not violate the discovery rules in the future. (R. 212, 230-1)

At least 35 States and the District of Columbia have provisions similar to the Illinois discovery rule that allow the exclusion of a defense witness as a sanction for a discovery violation. See State v. Taliaferro, 295 Md 376, 387, 456 A. 2d 29, 35 (1983). Most lower courts interpreting such provisions place some limits on their applicability. See Ronson v. Commissioner of Correction, 604 F. 2d 176 (2nd Cir., 1979) (good faith/prejudice test); United States ex rel. Enoch v. Hartigan, 768 F. 2d 161 (7th Cir., 1985) (balancing State's interest in enforcing discovery rule against defendant's

(Footnote Cont'd from Previous Page)

justified in violating the discovery rules." People v. Taylor, 141 Ill. App. 3d 839, 845 (1986) No such argument was ever made. (See petitioner's app. brief, pp. 28-30, reply brief, pp. 6-8). In fact, the petitioner expressly argued, as he does in this petition, that trial counsel was ineffective for failing to comply with the discovery rules. (App. brief, pp. 49-51; see infra, Argument II.)

Sixth Amendment interests); Fendler v. Goldsmith, 728 F. 2d 1181 (9th Cir., 1984) (harmless error test).

One court has flatly ruled "that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." United States v. Davis, 639 F. 2d 239, 243 (5th Cir., 1981). *

The holding of the Illinois Appellate Court in the present case is in direct conflict with the Davis opinion. Its failure to consider the application of a balancing test or to even address the constitutional issue raised demonstrates the need for this Court's intervention on this issue.

The witness excluded here was crucial to the petitioner's defense. His testimony would have corroborated the testimony of the other two defense witnesses that it was Maurice Bethany, and not the petitioner, who shot Jack Bridges. His testimony would have also rebutted Bethany's and Bridges' claims that they did not have weapons at the time of the incident. That this classic credibility contest presented a close question is demonstrated by the fact that the jurors did not feel confident enough to return a guilty verdict until they had reviewed a transcript of the testimony of Bridges and Bethany during their deliberations. (R. 396-401) Had the jurors heard the testimony of the excluded witness, it is probable that a different verdict would have been returned.

The issue presented is an important one which ought to be addressed and which can be most appropriately addressed in the present factual setting. See Lane v. Enoch, ___ U.S. ___, 89 L. Ed 2d 588 (1986), (White, J., Burger, C.J., and Rehnquist, J., dissenting); Smith v. Jago, 470 U.S. ___, 84 L. Ed 2d 836 (1985) (White, J., Burger, C.J., and Brennan, J., dissenting); Talisferro v. Maryland, 461 U.S. 940 (1983) (White, J., Brennan, J., and Blackmun, J., dissenting)

II. DEFENSE INSEL'S FAILURE TO COMPLY WITH DISCOVERY RULES WHICH RESULTED IN THE EXCLUSION OF A MATERIAL DEFENSE WITNESS AND HIS FAILURE TO IMPEACH ANY OF THE FOUR STATE WITNESSES WITH THEIR PRIOR CONVICTIONS SO UNDERMINED THE ADVERSARIAL PROCESS IN A CASE WHERE CREDIBILITY OF THE WITNESSES WAS THE SOLE ISSUE THAT THE STATE COURT'S SANCTIONING OF SUCH A TRIAL MUST BE OVERTURNED.

Even if this Court believes that the State's use of the exclusion sanction for defense counsel's discovery rule violation does not present a question worthy of its review, your Honors should nevertheless grant review to resolve the important corollary question of whether counsel's discovery violation, in conjunction with his failure to impeach the four prosecution witnesses with their prior convictions, denied the petitioner his Sixth Amendment right to the effective assistance of counsel.

The failure to comply with the discovery rules was clearly not attributable to the petitioner personally. Mr. Taylor had informed his attorney of the existence and whereabouts of the witness, Alfred Wormly, well before trial and counsel had interviewed and served a subpoena on Mr. Wormly a week before trial. (R. 205, 220-1) Thus, counsel's failure to comply with discovery rules and the resulting exclusion of a vital defense witness demonstrates that counsel was not functioning in a reasonably effective manner.

That counsel's failure to comply with the discovery rules was gross incompetence is shown by the trial judge's comments that the discovery violation was "blatant" and "willful" and that he was considering reporting "this to the disciplinary commission." (R. 230-1)

Similar failures to comply with discovery rules so that defense witnesses were excluded have been recognized as denials of the Sixth Amendment right to the effective assistance of counsel. See Commonwealth v. Bulard, 451 A. 2d 760 (Pa. Super., 1982); Commonwealth v. Simmier, 467 A. 2d 355 (Pa. Super., 1983)

Defense counsel's failure to impeach any of the four prosecution witnesses with their prior convictions added immeasurably to the unfairness of the trial. Prior to trial, the

prosecution tendered to defense counsel the criminal records of three of its witnesses and acknowledged that all three had prior convictions which were admissible to impeach their credibility. (R. 121) Complaining witness Jack Bridges had been convicted of aggravated battery and had spent 18 months in the penitentiary. His brother Maurice Bethany had been convicted of theft and placed on probation in 1978. Bridges' sister Jacqueline Jones had three theft convictions within five years of the time of trial. (R. 129) Just before the prosecution's final witness, Charles Trotter, another Bridges' relative, testified, the prosecutor informed defense counsel that he too had a prior unspecified conviction for impeachment purposes. (R. 232)

Defense counsel failed to impeach any of these witnesses with this devastating evidence. When this error was pointed out to counsel by the trial court at the close of the evidence, he made no response. (R. 324,7) The prosecution then was granted a motion in limine to preclude defense counsel from making any reference to the prior convictions in closing arguments. (R. 338-9)

The jury was thus deprived of crucial information concerning the prosecution witnesses which would have severely impeached their testimony. In People v. Nickson, 327 N.W. 2d 333 (Mich. App., 1982), the identical error was found to be a denial of the Sixth Amendment right to the effective assistance of counsel.

The Illinois Appellate Court's application of Strickland v. Washington, 466 U.S. 668 (1984), to the claims set out above completely distorts the Strickland standard. Without any analysis of the effects of the discovery violation and of the failure to confront the State witnesses with their prior convictions on the truth-seeking process, the court simply concluded that it could not be said that the trial had not produced a just result. People v. Taylor, 141 Ill. App. 3d 839, 846 (1986). The disingenuous nature of this holding was shown when the court went on to find that trial counsel's alleged deficiencies deal only with "questions of trial

strategy, exercise of judgment and discretion. A reviewing court's examination of competence does not extend to those areas." 141 Ill. App. 3d at 847.

Obviously, protecting the petitioner's Sixth Amendment right to present witnesses in his behalf and his Sixth Amendment right to confront the witnesses against him with highly damaging impeaching evidence does not involve trial strategy or the exercise of judgement or discretion.

The crucial issue in the case was the credibility of the prosecution and defense witnesses. Had the petitioner been allowed to present Alfred Wormly to enhance his case (and contradict the State's case), and had the four State witnesses been impeached by their prior convictions, there is a reasonable probability that the result of the trial would have been different. The absence of this crucial evidence "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984) This is particularly evident in light of the jurors' doubts about the credibility of the complaining witness and his brother expressed during their deliberations.

Review should be granted because the Illinois appellate court's holding conflicts with the decisions of other State courts cited herein and because the Illinois court's opinion dangerously misinterprets this Court's holding in Strickland v. Washington.

CONCLUSION

For the foregoing reasons, petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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By Emily Eisner
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Of Counsel.

December 1, 1986.

APPENDIX A

Published Opinion of the Appellate Court of
Illinois.

People v. Taylor, 141 Ill. App. 3d 839, 491
N.E. 2d 3 (1986)

that defendant was attempting to extort money from her for legal fees to which defendant and association were not entitled because they had lost their forcible entry and detainer action against her. Defendant responds that the letter relied upon by plaintiff was not properly before the trial court in deciding the motion to dismiss and that, in any event, it does not disclose an issue of material fact.

•1 We note initially that the October 21, 1982, letter is properly before the court on review. Contrary to defendant's argument that the letter was never "introduced into evidence," the letter was tendered to the trial court prior to the oral argument on defendant's motion for summary judgment and was relied on extensively by plaintiff, without objection, in her argument against the motion. This was sufficient to properly place the letter before the court. (See *Peltz v. Chicago Transit Authority* (1975), 31 Ill. App. 3d 948 (photographs of defendant at hearing without objection considered in affirming summary judgment).) Further, defendant misconstrues the law in arguing that this court is limited to reviewing only his motion and affidavit because plaintiff failed to file counters affidavits. While well-pleaded facts in defendant's affidavit stand as admitted and prevail over contradicted facts in plaintiff's unverified complaint (*Wooding v. L & J Press Corp.* (1981), 99 Ill. App. 3d 282), defendant's affidavit does not contradict all of the facts alleged in plaintiff's complaint or the contents of defendant's October 21, 1982, letter.

•2 Addressing the merits of this appeal, plaintiff alleges that defendant tortiously interfered with her existing contract to sell her condominium. While conceding that defendant was acting within the scope of his representation of the association, plaintiff argues that she need only show that defendant acted maliciously in the legal sense, meaning that he acted intentionally and without just cause. Contrary to plaintiff's argument, however, an attorney is accorded a conditional privilege when advising his client. A plaintiff may maintain a cause of action for tortious interference with a contract against an attorney who is conditionally privileged only if she can set forth facts from which "actual malice" may be inferred. (*Schott v. Glower* (1982), 109 Ill. App. 3d 230, 235.) Actual malice means a positive desire and intention to annoy or injure another person. (*Lovillard v. Field Enterprises, Inc.* (1965), 65 Ill. App. 2d 65, 76; *Oberman v. Dun & Bradstreet, Inc.* (7th Cir. 1972), 460 F.2d 1381, 1385.) In an action against an attorney, actual malice would necessarily include a desire to harm which is independent of and unrelated to the attorney's desire to protect his client. *Schott v. Glower* (1982), 109 Ill. App. 3d 230, 235.

•3 In the present case, the undisputed facts show that defendant

represented the association in its forcible entry and detainer action against plaintiff which concluded in plaintiff's favor on October 21, 1982. On that same day, defendant sent the association a letter advising it not to issue plaintiff a letter stating all her assessments were paid until plaintiff had paid for defendant's legal services rendered on behalf of the association. In light of defendant's failure throughout this action to give any basis for his apparent belief that he was entitled to collect his legal fees from the prevailing party, one reasonable inference from these facts is that defendant here ill will against plaintiff and had a positive desire to annoy or injure plaintiff by preventing her from obtaining a no assessment letter and selling her condominium. It is well settled that where reasonable minds might draw different inferences from the undisputed facts, including one unfavorable to the moving party, summary judgment is improper. *Moran v. Aken* (1981), 93 Ill. App. 3d 774, 777; *Smuthers v. Butler* (1979), 78 Ill. App. 3d 1018, 1020.

For the reasons set forth herein, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

STROUSE and REINHARD, JJ., concur.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.

RAY TAYLOR, Defendant-Appellant.

First District (1st Division) No. 84-1073

Judgment affirmed.

Opinion filed February 10, 1986. — Rehearing denied April 4, 1986.

1. CRIMINAL PROCEDURE (§215)—what necessary to establish denial of due process due to preindictment delay—attempted murder. In order to support claim of denial of due process because of preindictment delay, defendant must come forth with clear showing of substantial prejudice, and if court is satisfied that defendant was prejudiced, burden shifts to State to show reasonableness or necessity for delay.

2. CRIMINAL PROCEDURE (§217)—25 month delay between offense

and indictment did not constitute denial of due process. In prosecution for attempted murder, defendant was not denied due process of law because there was 22-month delay between time shooting incident took place and indictment, on basis that defendant was unable to locate numerous potential eyewitnesses to crime as result of such delay, since defendant failed to present any evidence of actual prejudice where counsel did not identify witnesses or make any showing that their testimony would be helpful to case.

3. DISCOVERY AND INSPECTION (§30.50)—severity of sanction for violation of discovery rules is for discretion of trial court. Decision of severity of sanction to impose on party who violates discovery rules rests within sound discretion of trial court.

4. DISCOVERY AND INSPECTION (§30.50)—trial court did not abuse discretion in excluding testimony of defense witness as sanction for violation of discovery rules. In prosecution for attempted murder, trial court did not abuse its discretion by excluding testimony of defense witness as sanction for violation of discovery rules, where defense counsel sought to add two witnesses to his answer to discovery after trial had begun and jury had heard testimony of two State witnesses, and court allowed one witness to testify as offer of proof outside presence of jury, since such testimony established that counsel had spoken with witness, knew identity and served him with subpoena prior to trial in which defense counsel had opportunity to list names of witnesses in answer to discovery and to indicate that their addresses were unknown.

5. CRIMINAL PROCEDURE (§328)—victim's statement to police properly admitted as excited utterance. In prosecution for attempted murder, trial court properly admitted into evidence statement made by victim to police shortly after he was shot, identifying defendant as one who shot him, since statement qualified as excited utterance which did not improperly bolster credibility of victim, where victim was running from attackers at time he was shot in back, and after police arrived immediately told officer that defendant shot him.

6. EXAMINATION OF WITNESSES (§104)—State properly impeached two of defendant's witnesses. In prosecution for attempted murder, State properly impeached two of defendant's witnesses who testified that they saw victim's brother fire three shots into crowd during street altercation, that one of shots hit victim, and that defendant had nothing in his hands when victim was shot, since both witnesses testified that they knew defendant had been arrested regarding incident eight months before trial began and neither witness informed police of alleged facts which could have exonerated defendant.

7. CRIMINAL PROCEDURE (§181.55)—factors considered in evaluating counsel's performance. In evaluating counsel's performance where inef-

fective assistance of counsel is alleged, defendant must show that counsel's performance was deficient and that such performance prejudiced defendant in that there was reasonable probability that but for counsel's error, result of proceedings would have been different.

8. CRIMINAL PROCEDURE (§408.5)—record failed to establish denial of effective assistance of counsel. In prosecution for attempted murder, defendant was not denied effective assistance of counsel where record as whole established that defense counsel represented defendant sufficiently to preclude finding of incompetency, since defendant's complaints were directed at questions of trial strategy, exercise of judgment and discretion which were not subject to reviewing court's examination.

9. CRIMINAL PROCEDURE (§791)—reference to "gangs" in prosecutor's closing argument did not constitute prejudicial error. Prosecutor's reference to word "gangs" during closing argument, regarding motive for shooting as gang related, did not constitute prejudicial error warranting reversal, since such error was harmless where State produced ample evidence of defendant's guilt, and prosecutor's single reference to gang activity could not be considered material factor in defendant's conviction for attempted murder.

Appeal from Circuit Court of Cook County; the Hon. James J. Heyda, Judge, presiding.

James J. Doherty, Public Defender, of Chicago (Richard Cunningham, Assistant Public Defender, of counsel), for appellant.

Richard M. Daley, State's Attorney, of Chicago (Joan S. Cherry, Kevin Sweeney, and C. Jeffrey Thut, Assistant State's Attorneys, of counsel), for the People.

JUSTICE CAMPBELL delivered the opinion of the court:

Following a jury trial, defendant, Ray Taylor, was convicted of attempted murder and sentenced to 10 years' imprisonment. On appeal, defendant contends that: (1) a 22-month pre-indictment delay denied defendant due process of law; (2) the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for violation of the discovery rules; (3) a prior consistent statement of the victim was improperly admitted into evidence; (4) the prosecutor improperly impeached two of defendant's witnesses; (5) defendant was denied effective assistance of counsel; and (6) certain prosecutorial remarks during closing argument deprived defendant of a fair trial.

At trial, Jack Bridges, the victim testified that on the evening of August 6, 1981, he was standing in front of his sister's house talking with his sister and others when he saw a neighborhood youth, Derrick Travis, sitting on his car. He approached Travis and told him to get off the car. Travis swore at Bridges, Bridges slapped Travis in the face, and Travis walked away. The defendant, who had been playing basketball in a playground across the street, approached Bridges and told Bridges that he had no business slapping Travis. An argument ensued between defendant and Bridges, as well as others who had witnessed the incident. The argument broke up after about 20 minutes and Bridges took a drive in his car to cool off. Bridges returned to the scene about an hour later and was informed by his brother, Maurice Bethany, that he should move his car. Bethany told Bridges that the defendant and his companions had driven by and said they were going to damage Bridge's car. Bridges put his car in a parking lot. As he was returning to his sister's house, he saw defendant and his companions talking to his sister. Bridges called out "I'm over here. Come over here." The group of men, who were carrying sticks and pipes, began walking towards Bridges. Bridges testified that he wanted to apologize to Travis for slapping him, but before he could do so, one of the men swung at him. Bethany then swung at one of the men. Bridges then noticed that defendant had a gun and he saw him fire it at Bethany, but the bullet did not strike Bethany. The men began beating Bridges with the sticks. Bridges broke free, began to run down the street, and the group pursued him. Bridges stated that when defendant was about four feet from him, the defendant fired four shots. The last shot struck Bridges in the back. Bridges fell to the ground and tried to crawl under a car. The defendant then pointed the gun at Bridges' head and pulled the trigger, but the gun misfired. He heard the defendant say "he's dead" and then heard a car screech away. The police arrived following the shooting and Bridges told them that "Ray-Ray" had shot him. "Ray-Ray" was defendant's nickname.

Hattie and Regina Algood gave substantially the same testimony on defendant's behalf. They are sisters and had been sitting on the steps of the church across the street from where the altercation occurred. They had lived in the neighborhood for some time and knew most of the people who were on the street that night. They saw a group of men, including defendant, approach Bridges and start hitting him with sticks. They stated that Maurice Bethany, the victim's brother, had a gun and that he fired three shots into the crowd, hitting Jack Bridges with one shot. Hattie and Regina Algood further testified that defendant was a friend and that they were aware the police were

looking for defendant the day after the incident. They did not, however, go to the police with the information that Maurice Bethany had shot the victim.

The defendant was indicted on the charge of attempted murder 22 months after the incident. A pretrial motion to dismiss was filed by defendant alleging that the State's delay in charging defendant was a due process violation because it "made it impossible for the defendant to reconstruct his activities on the date in question and prepare his defense." Defense counsel failed to present any evidence in support of the motion, and the motion was denied.

After two of the State's witnesses had testified at trial, defense counsel moved to amend his list of defense witnesses to add two names. Defense counsel explained that the names were not provided prior to trial because two buildings in the neighborhood where the incident took place had burned down and he was having difficulty locating witnesses. The court denied permission for the witnesses to testify, ruling that counsel should have listed the names of the witnesses in his answer to the State's request for discovery indicating that the addresses of the witnesses were unknown. The court permitted one of the witnesses, Alfred Wormley, to testify out of the presence of the jury as an offer of proof.

I

Defendant first contends that the 22-month delay in time between the shooting incident and his indictment resulted in substantial prejudice and denied him due process of law. Defendant argues that he was prejudiced because he was unable to locate numerous potential eyewitnesses to the crime as a result of the delay. Prior to trial, defendant moved to dismiss the indictment based on the delay. The trial court denied the motion, ruling that defendant failed to present any evidence indicating that he was prejudiced.

•1 In order to support a claim of denial of due process because of a pre-indictment delay, a defendant must come forth with a clear showing of substantial prejudice. If the court is satisfied that the defendant was prejudiced, the burden shifts to the State to show the reasonableness or necessity for the delay. (*People v. Lawson* (1977), 67 Ill. 2d 449, 367 N.E.2d 1244; *People v. Overturf* (1984), 122 Ill. App. 3d 625, 461 N.E.2d 640.) In *People v. Reddick* (1980), 80 Ill. App. 3d 336, 399 N.E.2d 997, the defendant alleged prejudice because of a delay in charging defendant which caused her to lose track of a material witness. This court held that the defendant did not show substantial prejudice where she did not identify or explain the significance of the un-

available witness at trial or on appeal.

•2 Despite the requirement of a clear showing of substantial prejudice, the defendant here failed to present any evidence of actual prejudice. Defense counsel stated he was unable to locate witnesses because they had moved from burned out buildings. Counsel did not identify the witnesses or make any showing that their testimony would be helpful to this case. Counsel did state that from a list of 20 potential witnesses, he had spoken to 10. The defendant has demonstrated only a possibility of prejudice. That is not enough to shift the burden to the State to show the reasonableness or necessity for the delay. *People v. DiBenedetto* (1981), 93 Ill. App. 3d 483, 417 N.E.2d 654.

Defendant relies on *People v. Gallely* (1980), 83 Ill. App. 3d 1066, 404 N.E.2d 1077, where this court held that a pre-indictment delay causes great suspicion and a presumption that the delay was prejudicial. In *People v. Overturf* (1984), 122 Ill. App. 3d 625, 461 N.E.2d 640, the court cautioned that the presumption created in *Gallely* does not permit a defendant to avoid the standard of actual prejudice. The court noted that "[a] careful reading of *Gallely* reveals that despite the court's reference to a presumption of prejudice . . . , it was actually relying upon a well-articulated showing of actual and substantial prejudice which was amply supported by the record." *People v. Overturf* (1984), 122 Ill. App. 3d 626, 627, 461 N.E.2d 640, 641.

II

•3 Defendant next contends that the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for a violation of the discovery rules. The Illinois Supreme Court rules require a defendant to respond to the State's motion for discovery by providing a list of intended witnesses within a reasonable time after the filing of the motion. (87 Ill. 2d R. 413(d)(6).) The defendant sought to add two witnesses to his answer to discovery after the trial had begun and the jury had heard the testimony of two State witnesses. Defense counsel explained he had not located the witnesses prior to trial because of burned out buildings in the neighborhood of the shooting. The trial court denied the motion, but did hear the testimony of one of the witnesses, Alfred Wormley, as an offer of proof outside the presence of the jury. During his testimony, Wormley indicated that defense counsel had spoken with him and served him with a subpoena a week prior to trial.

When discovery rules are violated, the trial judge may exclude the evidence which the violating party wishes to introduce. (87 Ill. 2d R. 415(g)(6).) The decision of the severity of the sanction to impose on a

party who violates discovery rules rests within the sound discretion of the trial court. *People v. Osborne* (1983), 114 Ill. App. 3d 433, 451 N.E.2d 1.

•4 We find unpersuasive defendant's argument that his counsel was justified in violating the discovery rules. The testimony of Wormley establishes that counsel had spoken with him, knew his identity and served him with a subpoena prior to trial. Yet counsel failed to list him as a witness. Defense counsel had the opportunity to list the names of witnesses in his answer to discovery and, if necessary, indicate that their addresses were unknown. We, therefore, believe the trial court was within its discretion in refusing to allow the additional witnesses to testify.

III

•5 Defendant further argues that the trial court improperly admitted into evidence a statement made by the victim to police shortly after he was shot identifying defendant as the one who shot him since it was a prior consistent statement which bolstered the victim's credibility. Consistent statements of testifying witnesses are generally inadmissible unless they are introduced to rebut a charge of recent fabrication or a claim that a motive to testify falsely has arisen since the prior consistent statement was made. (*People v. Powell* (1973), 53 Ill. 2d 465, 292 N.E.2d 409; *People v. Clark* (1972), 52 Ill. 2d 374, 288 N.E.2d 363.) The State contends that the rule against bolstering the credibility of a witness is not applicable since the statement of the victim was an excited utterance. (*People v. Pointer* (1981), 93 Ill. App. 3d 1064, 418 N.E.2d 1.) We agree.

The victim was running from attackers at the time he was shot in the back. As the victim hit the ground, the police arrived. As he was being placed in a paddy wagon for transportation to the hospital, the victim told Officer Jon Davis that "Ray-Ray" shot him. "Ray-Ray" was the defendant's nickname. Both the victim and Officer Jon Davis testified that the victim identified defendant immediately after the shooting as the man who shot him. Under these facts, we believe the victim's statement qualifies as an excited utterance and was properly admitted as evidence by the trial court.

IV

•6 Defendant next contends that the State improperly impeached two of defendant's witnesses, Hattie and Regina Algood. Both of these witnesses testified that they saw the victim's brother, Maurice Bethany, fire three shots into the crowd during the street altercation and

that one of the shots hit Jack Bridges. They further testified that defendant had nothing in his hands when the victim was shot. Defendant objects to the State's questioning of these witnesses on cross-examination. On cross-examination, both witnesses admitted they knew that the police were looking for defendant following the incident, but they did not exculpate defendant by going to the police with the information that Maurice Bethany had shot the victim.

A witness' failure to state a particular fact under circumstances rendering it natural or probable that she would state such a fact may be shown to discredit that witness' testimony. (*People v. Green* (1983), 118 Ill. App. 3d 227, 454 N.E.2d 792.) We believe the trial court properly permitted the impeachment of these defense witnesses. Hattie and Regina Algood both testified that they knew their friend, the defendant, had been arrested for this shooting eight months before trial began in this case, and neither witness informed the police of the alleged facts which could have exonerated defendant. See *People v. Martinez* (1979), 76 Ill. App. 3d 290, 395 N.E.2d 86; *People v. Wells* (1979), 77 Ill. App. 3d 603, 396 N.E.2d 315.

V

Defendant further contends that he was denied effective assistance of counsel. Specifically, defendant complains that defense counsel failed to impeach State witnesses with prior convictions, failed to present evidence of prejudice caused by the pre-indictment delay, violated discovery rules, and failed to object to certain testimony prejudicial to defendant.

●7 Our supreme court has adopted the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, for evaluating counsel's performance where ineffective assistance of counsel is alleged. (*People v. Albanese* (1984), 104 Ill. 2d 504, 473 N.E.2d 1246; *People v. Barnard* (1974), 104 Ill. 2d 218, 470 N.E.2d 1006.) The *Strickland* court held that... in order to establish ineffectiveness, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Defendant must establish that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.

●8 After reviewing defendant's specific complaints concerning defense counsel's performance at trial, we cannot say that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674,

692-93, 104 S. Ct. 2052, 2064.) The record as a whole reveals that defense counsel represented defendant sufficiently ably to preclude a finding of incompetency. Further, defendant's complaints are directed at questions of trial strategy, exercise of judgment and discretion. A reviewing court's examination of competence does not extend to those areas. *People v. Greer* (1980), 79 Ill. 2d 103, 402 N.E.2d 211.

VI

●9 Finally, defendant contends that it was prejudicial error for the prosecutor to comment during closing argument that the motive for the shooting was gang-related and that witnesses refused to testify out of fear of retaliation. From the record, we note that there was a single reference to the word "gangs" in the prosecutor's closing argument.

It is well settled that great latitude is afforded a prosecutor during closing argument. (*People v. Adams* (1982), 111 Ill. App. 3d 658, 444 N.E.2d 534.) Even if the comments by the prosecutor in the instant case are deemed improper, the error was harmless. An error in closing argument is not reversible unless the improper comments result in substantial prejudice to the defendant. (*People v. Turner* (1984), 127 Ill. App. 3d 784, 469 N.E.2d 368.) In deciding whether defendant was prejudiced, it is appropriate to assess the evidence of his guilt and to determine whether the error was a material factor in his conviction. (*People v. Graham* (1985), 132 Ill. App. 3d 673, 477 N.E.2d 1342. In this case, the State produced ample evidence of defendant's guilt, and the prosecutor's singular reference to gang activity cannot be considered to be a material factor in defendant's conviction.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

BUCKLEY, P.J., and O'CONNOR, J., concur.

APPENDIX B

Order Denying Petition for Leave to Appeal to the Illinois Supreme Court.

OPPOSITION

BRIEF

EDITOR'S NOTE

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NO. 86-5963

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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SUPREME COURT, U.S.

RAY TAYLOR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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14/11

QUESTIONS PRESENTED FOR REVIEW

Whether the state court's exclusion of a defense witness was proper as a sanction for a statutory discovery violation where the violation was willful, blatant, and in bad faith, where the testimony of the witness was not material to the outcome of the case, where the state would have been prejudiced by the allowance of the testimony, and where the exclusion did not violate the Sixth Amendment rights of the petitioner to present witnesses.

Whether petitioner was given the effective assistance of counsel guaranteed by the Sixth Amendment where his trial counsel's performance was not deficient and where his counsel's performance did not prejudice his defense.

TABLE OF CONTENTS

Questions Presented For Review.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinion Below.....	1
Jurisdiction.....	2
Statement of the Case.....	3
Reasons for Denying the Writ.....	4

I.

THE STATE COURT'S EXCLUSION OF A DEFENSE WITNESS WAS PROPER AS A SANCTION FOR A STATUTORY DISCOVERY VIOLATION WHERE THE VIOLATION WAS WILLFUL, BLATANT, AND IN BAD FAITH, WHERE THE TESTIMONY OF THE WITNESS WAS NOT MATERIAL TO THE OUTCOME OF THE CASE, WHERE THE STATE WOULD HAVE BEEN PREJUDICED BY THE ALLOWANCE OF THE TESTIMONY, AND WHERE THE EXCLUSION DID NOT VIOLATE THE SIXTH AMENDMENT RIGHTS OF THE PETITIONER TO PRESENT WITNESSES.....

4

II.

PETITIONER WAS GIVEN THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHERE HIS TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND WHERE HIS COUNSEL'S PERFORMANCE DID NOT PREJUDICE HIS DEFENSE.....

8

Conclusion.....	10
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TABLE OF AUTHORITIES

CASES:

<u>Braunskill v. Hilton</u> , 629 F. Supp. 511 (D. N.J. 1986).....	6
<u>Chambers v. Mississippi</u> , 410 U.S. 284 (1973).....	5
<u>People v. Braxton</u> , 81 Ill. App. 3d 808, 401 N.E.2d 1062 (1st Dist. 1980).....	5
<u>People v. Greer</u> , 79 Ill. 2d 103, 402 N.E.2d 211 (1980).....	9
<u>People v. McKinney</u> , 117 Ill. App. 3d 591, 453 N.E.2d 926 (1st Dist. 1983).....	5
<u>People v. Morales</u> , 109 Ill. App. 3d 183, 440 N.E.2d 302 (1st Dist. 1982).....	5
<u>People v. Osborne</u> , 114 Ill. App. 3d 433, 451 N.E.2d 1 (4th Dist. 1983).....	5
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	8
<u>United States v. Barron</u> , 575 F.2d 752 (9th Cir. 1978).....	6
<u>United States v. Boatwright</u> , 425 F. Supp. 747 (E.D. Pa. 1977).....	6
<u>United States ex rel. Enock v. Hartigan</u> , 768 F.2d 161 (7th Cir. 1985).....	6
<u>United States v. Nobles</u> , 422 U.S. 225 (1975).....	5
<u>United States v. White</u> , 583 F.2d 899 (8th Cir. 1978).....	6
<u>Williams v. Florida</u> , 399 U.S. 78 (1970).....	5

STATUTES:

Ill. Rev. Stat. 1983, ch. 110A, sec. 413(d)(i).....	4
Ill. Rev. Stat. 1983, ch. 110A, sec. 415(g)(i).....	4

IN THE
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APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OPINION BELOW

The opinion of the Illinois Appellate Court, First Judicial District, (People v. Taylor, No. 84-1073 (February 10, 1986)), is appended to the petition for a writ of certiorari as Appendix A.

JURISDICTION

The petition having been timely filed within sixty days of the Illinois Supreme Court's denial of leave to appeal, entered October 2, 1986, the jurisdiction of this Court is properly invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Respondent will concur in petitioner's Statement of the Case. (Pet. at p. 2) Any additional facts which are required for a better understanding of the questions presented will be included in the argument portion hereof.

REASONS FOR DENYING THE WRIT

I.

THE STATE COURT'S EXCLUSION OF A DEFENSE WITNESS WAS PROPER AS A SANCTION FOR A STATUTORY DISCOVERY VIOLATION WHERE THE VIOLATION WAS WILLFUL, BLATANT, AND IN BAD FAITH, WHERE THE TESTIMONY OF THE WITNESS WAS NOT MATERIAL TO THE OUTCOME OF THE CASE, WHERE THE STATE WOULD HAVE BEEN PREJUDICED BY THE ALLOWANCE OF THE TESTIMONY, AND WHERE THE EXCLUSION DID NOT VIOLATE THE SIXTH AMENDMENT RIGHTS OF THE PETITIONER TO PRESENT WITNESSES.

Petitioner contends that the Illinois state court's exclusion of a defense witness solely as a sanction for a statutory discovery violation is prohibited by the Sixth Amendment right of the petitioner to present witnesses. The premise underlying petitioner's meritless contention is that the allowance of the testimony by this witness in the instant case, would have caused no prejudice to the state.

Initially, it is of importance to note that petitioner concedes that by failing to provide the witness' name until after the first day of trial, defense counsel here clearly violated an Illinois discovery rule which required that he list the names and addresses of persons he intends to call as witnesses. (Pet. at 6) Further, what is most disturbing in this case, is that defense counsel had served the witness with a subpoena a week before trial and thus had ample opportunity to comply with this rule. (Pet. at 6) Petitioner's argument is, therefore, without merit, and the question he presents does not warrant this Honorable Court's expenditure of its valuable time. For this reason, and those which follow, respondent respectfully submits that the petition for a writ of certiorari must be denied.

Under Illinois law, defense counsel is required to inform the State of the names and last known addresses of persons he intends to call as witnesses. Ill. Rev. Stat. 1983, ch. 110A, sec. 413(d)(1). Further, if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such other party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. Ill. Rev. Stat. 1983, ch. 110A, sec. 415(g)(1). Thus, in Illinois, it is proper to require that defendant disclose prior to trial a list of the witnesses that defendant intends to call. Failure to comply with this disclosure requirement subjects the defendant to possible

sanctions, including the exclusion of the undisclosed witness. People v. McKinney, 117 Ill. App. 3d 891, 896, 453 N.E.2d 926 (1st Dist. 1983). Exclusion has been held to be a proper sanction where the facts and circumstances justify such action. People v. Braxton, 81 Ill. App. 3d 808, 815, 401 N.E.2d 1062 (1st Dist. 1980). Whether or not to impose such a sanction is a matter within the trial court's discretion and the court's decision will not be disturbed absent a showing by defendant of prejudice or surprise. People v. Morales, 109 Ill. App. 3d 183, 189, 440 N.E.2d 302 (1st Dist. 1982); People v. Osborne, 114 Ill. App. 3d 433, 437, 451 N.E.2d 1 (4th Dist. 1983). Therefore, the exclusion of a defense witness by the trial court was proper as a sanction for a statutory discovery violation.

The Sixth Amendment right to call and examine witnesses is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. Chambers v. Mississippi, 410 U.S. 284 (1973). The Sixth Amendment "does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as justification for presenting what might have been a half-truth. United States v. Nobles, 422 U.S. 225, 241 (1975). Further, except in a case where preclusion is imposed for reasons related to the integrity or probative value of the evidence, it necessarily detracts from the "search for the truth," which is, as the Supreme Court has stated, a central goal of the criminal justice system. Id. 422 U.S. at 232; Williams v. Florida, 399 U.S. 78, 82 (1970).

In the instant case, defendant waited until the People had presented several witnesses before he asked to add two witnesses to his answer to discovery. (R. 206) Defense counsel explained that he was unable to locate one of the witnesses because the witness had moved. (R. 212) However, counsel could not explain why he did not include the witness's name on his answer to discovery with the notation "address unknown." (R. 206) Therefore, the trial judge asked one of the witnesses, Alfred Wormley, to take the stand as an offer of proof outside the presence of the jury. (R. 214-226) At this time defendant's attorney repeated that he was only recently able to locate this witness because of a change in address. (R. 212) However, when Mr. Wormley testified as an offer of proof, it became evident that defense counsel had spoken with this witness and served him with a subpoena a full week before the trial began, yet counsel had not asked to amend his answer to discovery until after the trial had already begun. (R. 220)

Therefore, in the instant case, it is clear from the facts that the trial court excluded this witness because of the willful, blatant and deliberate violation of the

discovery rules. The integrity of the evidence involved here was threatened and defendant is merely trying to invoke the Sixth Amendment as a justification to present the half-truth testimony of his witness.

Further, the Federal District Court in Braunskill v. Hilton, 629 F. Supp. 511, 523 (D.N.J. 1986) ruled that an absolute prohibition of using the witness preclusion sanction is unnecessary because such a prohibition could result in making trial courts powerless to prevent criminal defendants from concocting last minute alibis. Likewise, in the instant case, this is exactly what the trial court feared. (R. 207, 230)

A number of courts have also held that preclusion of defense witnesses is proper because of counsel's failure to comply with court rules. See United States v. Barron, 575 F.2d 752 (9th Cir. 1978) (court upheld preclusion based on defendant's intentional failure to disclose the existence of his witnesses, until after the start of trial); United States v. White, 583 F.2d 899 (6th Cir. 1978) (preclusion of witness upheld where defendant did not disclose existence of witness until close of evidence because, he contended he had not been able to locate the witness previously); United States v. Boatwright, 425 F. Supp. 747 (E.D. Pa. 1977) (trial judge precluded testimony of witness where defendant did not disclose existence of witness, until five days after the start of trial).

Further, looking at the balancing test annunciated in United States ex rel. Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985), the preclusion of the defense witness here, was justified. Factors in the balancing test include the effectiveness of less severe sanctions, the impact of witness preclusion on the evidence at trial and the outcome of the case, the extent to which the prosecution will be surprised or prejudiced by the witness's testimony, and whether the violation of discovery rules was willful or in bad faith.

In the instant case, no less severe sanction would have been effective because the trial court obviously felt that due to defense counsel's deliberate actions of lying to the court about the witness, the preclusion was justified. The impact of the witness preclusion on the evidence at trial and the outcome of the case would not have been affected because the trial court found the witness's story to be less than truthful and also because the defendant did present his defense with two other witnesses whom the jury obviously did not believe. (R. 292-305) Further, the prosecution was surprised and would have been prejudiced if this witness was allowed to testify because the prosecution would have had no time to interview this witness for cross-examination purposes or to possibly find other witnesses to call in rebuttal. The trial had already begun. Finally, the violation of the

discovery rules was willful and in bad faith. The defense attorney told the trial court judge that the witness was not located before the trial began but the witness in an offer of proof, testified that the defense attorney had met with him a full week before the trial began. (R. 212, 220) Obviously, this was willful, blatant, and deliberate violation of the discovery rules.

Lastly, even if it was error to preclude the defendant's witness from testifying, this error was harmless. During an offer of proof, the trial court found that the precluded witness's testimony could not be believed because the testimony was contradicted by the witness, himself, after examination by the court at the offer of proof. (R. 217, 222, 230) Subsequently, the trial court stated that it doubted the witness's veracity for truth. (R. 230) Therefore, even if allowed to testify, the precluded witness would have added nothing to the defendant's defense and most certainly would have been shown to be lying on the witness stand as he was in the offer of proof. Further, the evidence against the defendant was very strong and, as was stated, the defendant did present his defense through other witnesses whom the jury chose not to believe. Therefore, it is very doubtful the jury would have believed this witness or reached a contrary verdict had this witness been allowed to testify.

As the state court's exclusion of a defense witness was proper as a sanction for a statutory discovery violation and where the exclusion did not violate the Sixth Amendment rights of the petitioner, the petitioner is not entitled to a writ of certiorari and the petition must be denied.

II.

PETITIONER WAS GIVEN THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHERE HIS TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND WHERE HIS COUNSEL'S PERFORMANCE DID NOT PREJUDICE HIS DEFENSE.

Petitioner contends that due to his trial counsel's failure to comply with discovery rules and his counsel's failure to impeach any of the four prosecution witnesses with prior convictions he was denied the effective assistance of counsel. Petitioner's argument, however, is mere hyperbole, and the question he presents again does not warrant this Honorable Court's expenditure of its valuable time. For this reason, and those which follow, respondent respectfully submits that the petition for a writ of certiorari must be denied.

The standard for evaluating counsel's performance where ineffective assistance of counsel is alleged was set forth by this Court in Strickland v. Washington, 486 U.S. 688 (1984). This Court ruled that a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

In the instant case, the petitioner specifically complains of two instances of ineffectiveness. In the first instance, petitioner complains that counsel's violation of a discovery rule leading to the exclusion of a defense witness denied him the effective assistance of counsel. (Pet. at 9) However, applying Strickland while it may be true that failure to include a witness on discovery is deficient, this was not an error so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Furthermore, the petitioner has made no showing that this deficient performance prejudiced the defense and deprived the defendant a fair trial.

First, the defendant still had the opportunity to present a defense with two other witnesses, who testified and whom the jury chose not to believe. Secondly, the testimony of the excluded witness was found not to be credible by the trial judge in an offer of proof. (See Argument I, Supra.) Third, the testimony of the excluded witness, even if credible, would have been nothing more than cumulative and added nothing new to defendant's defense. Therefore, even if counsel's performance was deficient, this performance did not prejudice the defense and did not deprive the defendant a fair trial. Thus, the jury's verdict of guilty was reliable.

In the second instance, petitioner complains that defense counsel's failure to impeach any of the four prosecution witnesses with their prior convictions added immeasurably to the unfairness of the trial. (Pet. at 9) Again, however, applying Strickland, this was not an error so serious that it can be said that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment. Furthermore, even if counsel's performance was deficient, this performance did not prejudice the defense.

In the instant case, even though defendant's counsel did not impeach the prosecution witnesses with their prior convictions, the jury was still made aware that all the prosecution witnesses did have prior criminal backgrounds. (R. 129) The jury was told by the prosecution in their opening statement that the victim had spent 18 months in prison for aggravated battery. (R. 129) The jury was also informed that the other state witnesses had prior theft and shoplifting convictions. (R. 129) Therefore, even though defense counsel failed to formally impeach the prosecution's witnesses, the record indicates that jury was aware of their criminal past when weighing each of the witness's credibility.

Accordingly, petitioner has failed to show how his counsel's performance prejudiced his defense. His counsel's conduct did not deprive the defendant of a fair trial and it cannot be said that the result of the trial was unreliable, especially since the jury was made aware of the convictions.

Finally, defendant's complaints are directed at questions of trial strategy, exercise of judgment and discretion and, in Illinois, a reviewing court's examination of competence does not extend into those areas. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 211 (1980). The record as a whole reveals that defense counsel represented defendant sufficiently ably to preclude a finding of incompetency and therefore, petitioner is not entitled to a writ of certiorari and the petition must be denied.

CONCLUSION

WHEREFORE, for all the foregoing reasons the respondent prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN,
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Counsel for Respondent.

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Of Counsel.

*Counsel for Record.

JOINT APPENDIX

No. 86-5963

Supreme Court, U.S.
FILED

APR 2 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

RAY TAYLOR,

Petitioner

v.

ILLINOIS,

Respondent

**On Writ of Certiorari to the Appellate Court of Illinois,
First District**

JOINT APPENDIX

PAUL P. BIEBEL, JR.
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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 1, 1986
CERTIORARI GRANTED JANUARY 27, 1987

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Indictment, filed June 14, 1983, in the Circuit Court of Cook County, Illinois [hereinafter trial court].....	2
Motion for Pretrial Discovery, filed July 1, 1983, in the trial court	4
Motion to Dismiss, filed November 10, 1983, in the trial Court	6
Answer to Discovery, filed December 29, 1983 in the trial court	8
Transcript of Proceedings:	
Oral Motion for Continuance, February 21, 1984, in the trial court	9
Defendant moves for leave to Amend Answer to Discovery, March 27, 1984, in the trial court	12
Offer of Proof; Motion denied, March 28, 1984, in the trial court	14
Jury request for testimony during deliberations, March 29, 1984, in the trial court	30
Opinion of the Illinois Appellate Court, First District, filed on February 10, 1986	34
Illinois Supreme Court Order Denying Leave to Appeal, filed October 2, 1986	43
Order of the United States Supreme Court granting Certiorari, January 27, 1987	44

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

DATE	ITEM
June 14, 1983	Indictment filed
July 1, 1983	State's Motion for Pretrial Discovery
August 25, 1983	Appearance of Vester Van filed
December 29, 1983	Defense files Answer to Discovery
January 10, 1984	Defense Amends Discovery Answer
March 26, 1984	Jury Trial Commenced
March 27, 1984	Jury Trial Continued
March 28, 1984	Jury Trial Continued
March 29, 1984	Defendant Found Guilty of Counts 1, 2, 3 & 5
May 1, 1984	Post Trial Motion denied; Defendant Sentenced to Ten years Imprisonment for attempt murder
May 2, 1984	Notice of Appeal filed
February 10, 1986	Opinion of Illinois Appellate Court, First Judicial District
April 4, 1986	Rehearing Petition Denied
October 2, 1986	Petition for Leave to Appeal Denied by Illinois Supreme Court

IN THE CIRCUIT COURT OF COOK COUNTY

The June 1983 Grand Jury
of the Circuit Court of Cook County

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on August 7th, 1981 at and within the County Ray Taylor committed the offense of attempt that he, without lawful justification with intent to commit the offense of murder, intentionally and knowingly attempted to kill Jack Bridges by shooting him with a gun, in violation of Chapter 38, Section 8-4 (38-9-1) of the Illinois Revised Statutes 1979 as amended, and

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 7th, 1981, at and within said County Ray Taylor committed the offense of aggravated battery in that he, in committing a battery on Jack Bridges intentionally and knowingly without legal justification caused great bodily harm to said Jack Bridges by shooting him in the back with a gun, in violation of Chapter 38, Section 12-4-A of the Illinois Revised Statutes 1979, as amended, and

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 7th, 1981, at and within said County Ray Taylor committed the offense of aggravated battery in that he,

intentionally and knowingly without legal justification caused bodily harm to Jack Bridges while using a deadly weapon, to wit: a gun, by shooting him in the back with said gun, in violation of Chapter 38, Section 12-4-B (1) of the Illinois Revised Statutes 1979 as amended, and

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook in the State of Illinois, the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid present that on August 7th, 1981, at and within said County Ray Taylor committed the offense of armed violence in that he, while armed with a dangerous weapon, to wit: a gun, intentionally and knowingly without legal justification caused great bodily harm to Jack Bridges by shooting him in the back with said gun, in violation of Chapter 38, Section 33A-2/I/12-4-A of the Illinois Revised Statutes 1979, as amended, and contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

MORGAN M. FINLEY
Clerk of the Circuit Court
of Cook County

/s/ Richard M. Daley

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

Indictment No. 83-C-5917

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

RAY TAYLOR,
Defendant(s)

MOTION FOR PRE-TRIAL DISCOVERY
PURSUANT TO ILLINOIS SUPREME COURT RULE 413

TO:

Now come the People of the State of Illinois, by RICHARD M. DALEY, State's Attorney of Cook County, by his Assistant, Samuel L. Grossman and moves this Honorable Court, pursuant to Illinois Supreme Court Rules 413(c), 413(d) and 415(b) to enter an Order directing the defendant and his attorney or attorneys:

1. To give written notice to the People of the State of Illinois of any defenses, affirmative or non-affirmative, which the defendant intends to assert at any hearing or at trial. RULE 413(d).

2. To furnish in writing to the People of the State of Illinois, the names and last known addresses of persons the defendant intends to call as witnesses, together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, and any record of prior criminal convictions of such witnesses known to the defendant or his attorneys. RULE 413(d).

3. To inform the People of the State of Illinois, and to permit the inspection and copying or photographing of any reports, results or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments, or comparisons, and any other reports of statements of experts which defense counsel has in his possession or control, including, but not limited to, statements made by the defendant contained in reports, any part of which defense counsel intends to use at a hearing or trial. Rule (413(c))

4. To furnish the People of the State of Illinois with any books, papers, documents, photographs, or tangible objects the defendant or his attorneys intend to use as evidence or impeachment at a hearing or trial. Rule 413(d)

5. To notify the People of the State of Illinois of the evidence of any material or information subject to disclosure which is discovered subsequent to compliance with any orders entered pursuant to Illinois Supreme Court Rules 413(c) and 413(d). Rule 415(b)

RICHARD M. DALEY
State's Attorney of Cook County

By:
Assistant State's Attorney
Room
2650 South California Avenue
Chicago, Illinois 60608

S.A.O. 105

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

(Title Omitted in Printing)

MOTION TO DISMISS

Filed November 10, 1983

Now comes the defendant, RAY TAYLOR, by his attorney, VESTER L. VAN, and moves this Honorable Court to dismiss the above-captioned indictment. It is alleged that a hearing on this motion would show that the arbitrary delay between the alleged crime and the defendant's arrest amounted to a denial of the process of law, under the authority of the case of *Ross v. U.S.*, 349 F 2d, 210 (1965).

In support whereof, it is alleged that:

1. The above-captioned indictment charged the defendant with attempt murder, aggravated battery and armed violence on August 7th 1981.
2. The person who testified before the Grand Jury is a Chicago Police Officer, who has the duty to arrest those who he has reason to believe have violated the laws of the State of Illinois.
3. The defendant in this case was not arrested on this matter.
4. The defendant was arrested on another matter February 27th 1983.
5. The delay between the date of the alleged offenses and the date of arrest of the defendant has made it impossible for the defendant to reconstruct his activities on the date in question and prepare his defense.

6. There was not lawful reason for the delay between the date of the alleged offense and the arrest of the defendant.

7. The indictment against defendant was filed on June 14th 1983.

WHEREFORE, defendant prays this Honorable Court to grant him a hearing to prove the allegations set forth in this complaint if any of them are denied by the State. If said allegations are either admitted or shown by a hearing to be correct, it is prayed that the indictment be dismissed.

Respectfully submitted,

/s/ Vester L. Van
VESTER L. VAN 24521
Attorney for Defendant

3-27-84
P-816

3-27-84
P-816

THE PEOPLE OF THE STATE OF ILLINOIS)

vs.

Ray Taylor

No. 83-5917

ANSWER TO DISCOVERY

TO: RICHARD M. DALEY, ESQ.
STATE'S ATTORNEY OF COOK COUNTY

NOW COMES Ray Taylor, by ^{Attorney at Law} Attorney VESTER L.

VAN, and answers the Motion for Pre-Trial Discovery filed by the

State as follows:

1. The defendant will assert a non-affirmative defense.

2. List of Witnesses Rule 413 (d) Earl Travis
655 S. First St. Chicago, IL
Any persons named in Police Reports and Preliminary Hearing Trans-
cripts: rather Alford Regina Alford 6515 S University Lathe Taylor
7312 S Dorchest

3. List of reports (413) (c) 84
1C-84
None, known at this time, investigation continues. DDT-84

4. List of books or tangible objects (413) (d). None
known at this time, investigation continues.

5. Evidence discovered subsequent to compliance. None
known at this time, investigation continues.

DEFENDANT

BY: Ray Taylor
[Signature]

VESTER L. VAN
32 West Washington Street
Chicago, Illinois 60602
580-1171

Derrick Travis
6352 S. Kimbark
Chicago, Illinois
3-26-84

Robert Williams
End of report
3-26-84

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT
CRIMINAL DIVISION

(Title Omitted in Printing)

MOTION FOR CONTINUANCE

February 21, 1984

• • • •

[2] THE CLERK: People of Illinois versus Ray Taylor.

THE COURT: How are you, Mr. Taylor?

DEFENDANT TAYLOR: How are you?

THE COURT: Mr. Van, how are you?

MR. VAN: Fine, Judge.

Judge, for the record Vester Van for Mr. Taylor. Judge, this matter was set down for trial today. However, I just got back in town last night. It was my understanding that the State's Attorney did call my office Friday and indicated they would be answering ready today.

I also due to the fact that two of my main witnesses have not—I have not been able to locate because of the fire to an apartment building, we'd be asking for a date in this matter, Judge.

THE COURT: State, are you answering ready?

MR. SPIVACK: Ready, Judge.

THE COURT: Okay.

MR. VAN: We would also like to indicate to the Court the defendant is presently now out on bond. His family was able to bond him out last week.

THE COURT: Did I ever rule on your motion, Mr. Van?

MR. VAN: No, you said you would rule on the motion just prior to trial.

THE COURT: Did you want to put any evidence in in [3] relation to the motion?

MR. VAN: Not at this time. Not today. We were going to be—We were going to prepare to argue the motion just before trial.

MR. SPIVACK: Which motion was this? Motion to dismiss?

MR. VAN: Yes.

MR. SPIVACK: On 12/19 the motion to dismiss based on denial of right to speedy trial was denied on 12/29.

THE COURT: I think I basically—

MR. VAN: Leave was granted to amend the petition to dismiss which was—another petition was entered, amended petition.

MR. SPIVACK: The only one I have is amended was filed on December 20th. That's the one you ruled on.

THE COURT: I think what I did is I tentatively denied it.

MR. VAN: Yes, you tentatively denied it.

MR. SPIVACK: I show you denied that part of it in total based on the speedy trial with the right to refile an amended motion on other grounds to dismiss. But I don't believe that has been done.

THE COURT: Were you going to put in any evidence in relation to the motion?

[4] MR. VAN: No, Judge. It would have been bringing some possible cases we believe would lend credit to our argument as to the speedy trial part of the Illinois Statute.

MR. SPIVACK: I think that part was denied, the speedy trial part.

THE COURT: Well, I went to the library and looked at some cases so I will deny the motion then, and I will

make sure it is noted in my half sheet. If there are some cases that you want to give me, I will reconsider your motion. Other than that as of this moment, it is denied.

MR. VAN: Okay, Judge.

THE COURT: This is an '83 case?

MR. SPIVACK: It is an '83 indictment, Judge, but the incident happened in 1981.

THE COURT: Mr. Van, what I will do is I will give it a trial date. I will give you a long date, and I'd like to go ahead on it.

MR. VAN: Okay, that will be fine.

THE COURT: Because of the date that it started. How about if I give you motion defendant, 3/26?

MR. VAN: Okay, that would be fine, Judge. I will subpoena my witnesses at that time, Judge. We'd be ready [5] on that date.

THE COURT: Okay.

MR. VAN: Judge, concerning the motion to dismiss, there was another question pertaining to the motion as to the fact that I still would like to argue that part of the motion before trial on that date. There are some constitutional questions pertaining to the fact that the case happened in 1980, and the fact that all times it was obvious that the police knew where he was at that time. They never even issued an arrest warrant for the person. He was in custody in violation of his due rights. We would like to argue that part of the motion before trial if possible.

MR. SPIVACK: I think that was argued prior, I think, in the original motion.

THE COURT: I think that was all brought up the last time when I tentatively denied it.

MR. VAN: All right. We'll be indicating at this time it will be a jury trial.

THE COURT: Okay.

MR. VAN: Okay. Thank you, Judge.

* * *

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

(Title Omitted in Printing)

REPORT OF PROCEEDINGS

March 27-29, 1984

• • • • •

March 27, 1984

[205] THE COURT: People versus Ray Taylor.

Mr. Van, what would you like to address me on?

MR. VAN: At this time, Judge, we would make an oral motion to amend our Answer to Discovery.

During the direct testimony of the witnesses, your Honor, called by the State, I was informed of some additional witnesses which could have and probably did, in fact, see this entire incident. We at this time would ask to amend our Answer to include two additional witnesses.

THE COURT: Who are they?

MR. VAN: One is a guy named Alfred Wrdely of which—

THE DEFENDANT: Excuse me, W-r-d-e-l-y.

MR. VAN: Whose address I do not have. I'm going to have to see if I can locate him tonight. And Pam Berkhalter.

THE COURT: The question I have is why were they added today and not yesterday and not a month ago or not a year ago?

MR. VAN: Well, Judge, I investigated the matter, and my investigator came back with a set of names mostly which were included in the police reports.

THE COURT: Yeah, but the defendant was there, and [206] the defendant is now telling you Pam Berk-

halter, and he's now telling you Alfred Wrdely. Why didn't he tell you that sometime ago? He's got an obligation to tell you.

MR. VAN: That is correct, Judge. He, in fact, told me about Alfred sometime ago. The problem was that he could not locate Alfred.

THE COURT: Why didn't you put him on the list of witnesses and put address unknown?

MS. TRAFALLET: We would object. Also, Judge, counsel amended his Answer about a month ago in this case, and we sent an investigator out, two persons that he put on addresses, and they were burned out buildings, and we asked him to supplement those with the correct addresses, and we never got them.

THE COURT: I'll tell you what I'll do. I'll allow you to amend your list of witnesses. In fact, I added them in myself, Alfred Wrdely, and Pam Berkhalter on the top, and bring them here tomorrow. I'm not saying whether they will testify or not, but you can have them here, and I'll consider it at that time.

MR. VAN: Okay, Judge.

THE COURT: But I have difficulty understanding—this [207] is not the type of case where the defendant would not know about witnesses. It's not like some of those where the State comes up with all sorts of witnesses, and you're searching the neighborhood.

The defendant is at the scene. We have a prior trial, apparently, in this matter. His buddies and cohorts are on trial in that case. We've got a victim and two brothers of his, and his sister that's all on the scene. There's all sorts of people on the scene, and all of these people should have been disclosed before.

When you bring up these witnesses at the very last moment, there's always the allegation and the thought process that witnesses are being found that really weren't there. And it's a problem in these types of cases, and it should be—should have been put on that sheet a long time ago.

At any rate, I'll worry about it tomorrow.

MR. VAN: Judge, one—

THE COURT: If you tell me you don't know where Wrdely is—maybe Mr. Wrdely will show up, and maybe Mr. Wrdely will not.

MR. VAN: Judge, the problem that we have had also with our witnesses is that the fact that the two buildings [208] that the State had mentioned were, in fact, burned down. And I've mailed letters with forwarding addresses.

MS. TRAFALLET: That's the defendant's sister. The defendant give us an address of—a bogus address of his sister and his brother, and they're burnt out buildings.

THE COURT: The record should reflect that the defendant is out on bond. It's not like one of the cases where the defendant is in the House of Corrections or the Cook County Jail.

MR. VAN: He just got out on bond recently, and he hasn't been out on bond a long time.

THE COURT: For a couple of months now, hasn't he?

MS. TRAFALLET: Absolutely.

THE COURT: Bring your witnesses here tomorrow. I'm going to hear from all of them.

MR. VAN: Thank you, Judge.

THE COURT: I don't know whether the jury will hear from all of them, but I will see everyone tomorrow.

. . . .

March 28, 1984

[210] THE CLERK: Ray Taylor.

THE COURT: Are your witnesses here, Mr. Van?

MR. VAN: Yes, one of them, Judge.

THE COURT: And that name is?

MR. VAN: Mr. Wormley.

THE COURT: And yesterday when we left here, if I recall right, the State, outside of the presence of the court reporter asked you for the address of that witness and

also the date of birth of that witness so they could get a B of I, is that correct, Mr. State's Attorney?

MR. DE ROSE: Yes, Judge.

THE COURT: Did you get the date of birth and also the address of that Witness?

MR. DE ROSE: I got it about 15 minutes ago, Judge. I also asked for the other witnesses, their B of I and addresses. I didn't get any of them until about 15 minutes ago.

MR. VAN: The reason for that is when I called the State's Attorney's office, about 5:30, quarter to 6, nobody was there.

MR. DE ROSE: Judge, for one thing, I specifically remained in the courtroom after court yesterday for about 15 minutes when counsel was going to give me the B of I and the addresses and then, if counsel recalls, [211] I asked them, said, "Counsel, I am going to go upstairs. How long are you going to be?" He said probably another five or ten minutes. I said, okay, I will wait here, then, to get addresses and everything. He said, "No, I will bring them up to your office. What floor are you on?" I gave him my office and my name and I received nothing and I just got them about 15 minutes ago and I am trying to have my investigator right now do something with them and I don't know if I will be able to.

MS. TRAFALLET: Judge, furthermore, Counsel did not add the last name until after the trial started. Certainly he cannot claim surprise. This guy was new, where has he been. If he wanted to add somebody and Counsel finds them he certainly could have done that before trial and asked for a date, whatever. He has waited until this trial, selected a jury and the State has already put on its witnesses and then he adds a name.

Judge, we would object at this point.

THE COURT: Mr. Van?

MR. DE ROSE: Judge, just one last note on that. I believe yesterday Counsel did state that if he knew about Alfred Wormley but you just couldn't serve them, so it is

not any witness that just came to light because of any testimony or anything that happened during [212] the trial and that is why we are objecting to that witness at this particular time and the other witnesses, we don't have any background material that Counsel supplied to us yesterday.

MR. VAN: Judge, in the light of criminal fairness in this case, it has been indicated at the hearing that there were approximately 20 or 30 people on the street when this incident took place. Since that time there have been numerous fires in that particular area of Chicago and these three or four six-flat buildings have been gutted and burned down. It has been a traumatic experience for myself to even locate the witnesses. A lot of them have moved and left no forwarding addresses.

THE COURT: Mr. Van, you are forgetting one thing. You could always name the witness and indicate no address available at present. To do what you did is inexcusable and I have had, for the record, so many violations of discovery rules by the defense in the last few trials that it is unbelievable. Since the opinion on Judge Schiller came down where he got reversed for not allowing the defense to put in an affirmative defense when they brought it up in the last moment, I have had in the last two trials affirmative defenses that came in after the trial started. Now in this case all you had to do was put down the name [213] of the witness, even put down his last known address and indicate that you are seeking the present address and you wouldn't have any problem here, but now what am I going to do? I am interested in finishing the case because I have got to try. I have a fourth term case that I would like to start working on Friday and here I am.

Now, the Appellate Court will always say well, the Judge should have given 24 hours or allowed the State to talk to that witness ahead of time but that still does not accomplish getting the State a B of I. In 24 hours they could do it. Now I am sitting here and the jury is cooped

up in the jury room. They are ready to go. I quit yesterday at 2:30. Am I going to send them home now without hearing anything and just have a super waste of judicial time? What you did is inexcusable as far as this Court is concerned.

How long will it take you to get B of I's of those other witnesses?

MR. DE ROSE: Judge, I don't know. I had my investigators, like I said, as soon as I got them today from Mr. Van I got on it, the phone with my investigator and I can call now and see if he has met with any success. I gave them to him just roughly around 12:30 this afternoon.

THE COURT: What is Wormley going to testify to? [214] MR. VAN: He is going to testify as to what he saw on the day in question.

THE COURT: He was an eyewitness?

MR. VAN: Now, he was not an eyewitness.

THE COURT: Put him on the stand as an offer of proof.

Mr. Wormley, step on the witness stand and raise your right hand.

(Witness sworn)

THE COURT: Conduct this from counsel table. This is an offer of proof with cross examination. Allowed.

ALFRED WORMLEY.

a witness called by the Defendant herein, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. VAN

Q Will you state your name, please.

A Alfred Wormley.

Q Alfred, where do you live?

THE COURT: Excuse me. How do you spell your name?

THE WITNESS: W-o-r-m-l-e-y.

THE COURT: Was that the same spelling you had the other day?

MS. TRAFELET: No, it was not.

[215] MR. VAN: It was W-o-r-l-y.

THE COURT: The record will reflect it, but I am quite sure what I got now is not the same spelling that I even put on—

MS. TRAFELET: We got W-o-r-d-l-e-y.

THE COURT: Continue on.

MR. VAN: Q Mr. Wormley, where do you reside?

A 6342 South Kimbark.

Q Calling your attention to August 6, 1981, where did you live?

A 6401 South Kimbark.

Q Do you recall being in that area at approximately 8 o'clock that night?

A Yes, sir.

Q And what, if anything, were you doing?

A Well, I was coming from Harper Court and I seen people on the front porch at 64th and Kenwood and I went over to the front porch.

Q When you say you saw people at this address, who, in fact, did you see

A I seen—I don't know his name right off but the guy who is sitting out there now.

Q You are talking about this man right here? (Indicating)

[216] A Yes.

THE COURT: There is a motion to exclude.

MR. DE ROSE: That is our victim, Judge. He testified.

THE COURT: Okay.

MS. TRAFELET: The State will stipulate, Jack Bridges, Judge.

THE COURT: Okay, have the record indicate the other potential witnesses are walking out of the courtroom.

Continue on.

THE WITNESS: A Jack, whatever you say, Bridges, his sister and two other guys, his brothers were up there.

MR. VAN: Q Did you approach those individuals?

A Yes, sir.

Q And what, if anything,—did you have a conversation with anyone?

A No, sir.

Q What, if anything did you learn by standing there in the crowd?

A Well, Jack had a blanket. It was two pistols in there and he gave it to—

Q And then what, if anything, did they say at that time, if you can recall?

A Well, they were saying what they were going to [217] do to the people. Say they were after Ray and the other people.

Q What, if anything, did you do at that time?

A At that time I left. I was on my way home and I happened to run into Ray and them and so I told them what was happening and to watch out because they got weapons.

Q And what did you see Ray do?

A Went on the side street of 64th and Between Kimbark and Woodlawn.

Q Mr. Wormley, have you ever been arrested or convicted of a crime?

A No, sir.

Q How old are you?

A 21.

MR. VAN: I have no further questions, Your Honor.

MR. DE ROSE: Judge, since we are outside the presence of the jury, I would be asking the witness who is under oath if he has any prior criminal background.

THE COURT: Go ahead. You are under cross examination. This isn't going to be introduced to the jury trial. You can ask any questions you want that are relevant. Go ahead.

CROSS EXAMINATION

BY MR. DE ROSE

[218] Q Mr. Wormley, have you ever been convicted of a crime?

A No, sir.

Q Have you ever been arrested?

A Disorderly.

Q How old are you, sir?

A Twenty-one.

Q Have you ever been convicted as a juvenile?

A Yes, sir.

Q How many times?

A Once.

Q For what?

A Breaking and entering.

Q What did you get, probation?

A I didn't get nothing. They let me free because the one, the woman in the house, she knew me. They didn't press charges.

Q When was that?

A That was 1982.

Q What judge did you go before?

A I didn't go before no judge.

Q You were a juvenile at the time?

[219] A Yes.

A You are 21 now?

A Yes.

Q That was two years ago?

A Ahum.

Q What court did you go to?

A Didn't go to no court.

Q The police arrest you?

A Yes.

Q But you never went to court?

A No.

Q What is your date of birth?

A 1962, first month, 28th day.

THE COURT: January 28, 1962?

THE WITNESS: Ahum.

MR. DE ROSE: Q Mr. Wormley, you said on the date of this incident you lived at 6401 South Kimbark, is that right?

A Yes.

Q Now, you live at 6241 South Kimbark?

A Yes.

Q How long have lived at that address?

A Just recently.

Q Where did you live between—

[220] A 132 North Pine.

Q When did you learn you were going to testify today?

A Last week.

Q How did you know that?

A Because the guy came by my house.

Q This guy came by your house last week?

A Yes. I forgot his name.

Q Mr. Van?

A Yes.

Q Came by your house last week?

A Yes.

Q And asked you if you would come to testify?

A Yes.

MR. DE ROSE: I have no further questions.

THE COURT: Redirect?

MR. VAN: No, Judge.

THE COURT: I have some questions.

FURTHER EXAMINATION

BY THE COURT

Q Mr. Wormley, when Mr. Van came around your house—First of all, what day did he come around; do you know?

A Wednesday.

Q Wednesday of last week?

[221] A Yes. ———

Q The day he came around your home was March 21st, right?

A If that was Wednesday, Yes.

Q Did he give you a subpoena?

A Yes.

Q Do you have a copy of that subpoena?

A It is in my jacket.

Q Go out and get it for me.

(Witness leaves the stand.)

THE COURT: Would you take the witness stand again.

For the record the defendant handed me a Circuit Court of Cook County subpoena form. It is addressed to Alfred W-o-m-l-e-y, in case No. 82-4817 and indicates that Alfred—okay, the body has got W-o-r-m-l-y, to appear before the Honorable blank on March 28, 1984 in room 207, Circuit Court, 26th and California Avenue, Chicago, Illinois at 10:30 A. M. The name Vester L. Van, attorney for the defendant, 32 West Washington, 580-0171.

Q Did you talk to Mr. Van when you received that subpoena?

A Yes, sir.

Q What did you talk to him about?

A Well, he was talking about the case.

[222] Q What did he say?

A He was asking me a few questions about what happened.

Q Do you know who he got your name?

A No, sir.

Q Are you a friend of the defendant in this case?

A Well, I met him recently.

Q You met him recently?

A Yes.

Q Did you ever talk to him about—when you say you met him recently, how recently?

A I would say about four months ago.

Q Did you ever talk to him about this case?

A No, sir.

Q Did you know about the fact that he was charged with this case?

A No, sir.

Q Did he ask you to testify in this case?

A No, sir.

Q Did he ever mention that he knew you were a witness to this case?

A No, sir.

Q Did you know or have any idea how your name was given to anyone as a witness in this case?

[223] A No, sir.

Q Now, you stated that you were on the scene on the evening in question before the shooting occurred, correct?

A Right.

Q And you saw the defendant—excuse me—you saw the victim, Jack Bridges, and his sister and two brothers and somebody had a blanket, right?

A Yes, sir.

Q Who had the blanket?

A Donna Kerr.

Q Donna Kerr?

A Yes, sir.

Q You want to tell me who Donna Kerr is?

A I guess that was his girlfriend at the time. I don't know, sir.

Q Donna Kerr. Is that two names?

A No, sir. I guess it is one. Donna Kerr. Yes, it is one.

Q That was the girlfriend of who?

A Jack Bridges, I believe.

Q She had the blanket?

A Yes, sir.

[224] Q What did she do with the blanket?

A Well, she was holding the blanket and I happened to look and see the pistol, as a matter of fact, two pistols and then I just waited about five minutes and I left. I was on my way home.

Q Well, did she have these two pistols wrapped in the blanket?

A Yes, sir.

Q Did she hand them, the blanket to anyone?

A No, he handed it to her.

Q Well, you stated that you only met the defendant four months ago.

A Yes, sir.

Q But yet you knew him and you stopped him on the streets and you told him that Jack Bridges' girlfriend Donna, had a blanket and there were two guns in there, right?

A I stopped him and the other guys that was with him. I knew the other guys.

Q Well, you testified before you stopped Ray, right?

A Yes.

MR. VAN: Judge, possibly I can ask a question here.

THE COURT: You will be able to as will the State when I get through. Both of you will be able to cross [225] examine him on the basis of anything I asked him.

Q But you still maintain that you did not know Ray until four months ago?

A Yes, sir.

Q Did you know him by seeing him on the street?

A Yes.

Q In August of '82?

A Yes. I seen him before.

THE COURT: Okay, anyone want to ask any questions in regard to my questions?

EXAMINATION

BY MR. VAN

Q When you say you went around the corner and stopped some people on the street, who, in fact, in that crowd did you know?

A I knew Earl Travis. I knew his brother, Derrick Travis.

Q Derrick Travis is about your age, isn't he?

A He is about two years younger than me.

Q Anyone else?

A The other guy, I knew his name Samuel. I don't know his last name and Ivory, his brother.

Q And all those guys were with Mr. Taylor, is that correct?

[226] A Yes, sir.

MR. VAN: I have no further questions.

MR. DEROSE: Just one question, Judge.

EXAMINATION

BY MR. DE ROSE

Q Did you know Ray Taylor in 1981?

A I seen him before. I didn't know him.

Q Did you know him in 1981?

A No, sir.

MR. DE ROSE: I have nothing further, Judge.

THE COURT: Anyone else?

Thank you.

(Witness excused)

THE COURT: Arguments?

MS. TRAFELET: Talk about blatant violation of the discovery rules, Counsel not only told you he didn't know

where he was, he told you today, yesterday he told you he didn't have an address. Today he stood right in front of you and told you had had a hard time finding these witnesses because they had been burned out. I mean, he stood in front of this court and lied, Judge, about his knowledge, where that witness—

MR. VAN: We would be objecting.

MS. TRAFELET: And then he wants, then gets the [227] witness up here and has known this witness for a week, he subpoenaed him a week ago. If you let this witness testify we may all take these discovery rules and throw them away, Judge. This is a blatant, just a blatant violation.

THE COURT: Mr. Van, hang in there. You will get an opportunity to address me.

MS. TRAFELET: He lied to you about what he knew, but this witness, Judge, I think you could easily precluded this witness from testifying based on the fact he couldn't find him, just recently until today. He has not shown diligence of what he did to try to find this guy, but not only that, Judge, he lied to this Court about the knowledge of this witness. He had this witness since last Wednesday and yesterday he said he had a name but didn't have an address and today he told you he wasn't able to find him because he had been burned out, Judge. I mean, honest to God, if you let this witness testify you might as well throw the rule books away.

THE COURT: I think this should go into the record, too.

For the record, the subpoena that Mr. Alfred Wormley handed to me, being stamped by the Clerk, and go into the file, court file—

MR. VAN: Judge, first of all, as I indicated to you [228] earlier today, there were numerous witnesses in this matter. I had a list of approximately 20 people who I could have possibly called as witnesses. I went out last week in a neighborhood and found approximately ten dif-

ferent people who said they had seen the incident. I took their names. Some of them I gave subpoenas and some of them I didn't. It was an oversight on my part because I was almost sure that Mr. Wormley was, in fact, on my petition as a witness. I had went to the police reports and tried to find out the witnesses in the police report, and his name was not in the police report. It was an oversight on my part because I thought that his name was, in fact, on the police report but it was not. Then I later found out that a lot of the witnesses, you know, called me and said that they, you know, they weren't coming in regardless of whatever and I only have two witnesses concerning this matter.

Although Mr. Wormley did not, in fact, see the incident, I think he is a good part of my defense in this case and I would ask that he be allowed to testify in this matter.

THE COURT: All right, anything further that the State would like to ask or add?

MS. TRAFELET: Only, Judge, we only came in here [229] this morning. He knew about Wormley. He knew his address and yet he stood up here and told you he didn't know his address and couldn't find him because he had been burned out. That is not true by his own admission. Now he said it was an oversight. Judge, he did not tell you that 20 minutes ago when you asked originally about this.

MR. VAN: In fact the man does have a different address. He had just recently moved from the north side back to the south side.

MS. TRAFELET: That is not the point, Judge. You know what we are talking about. This is blatant and Counsel is still lying when he tells you it was an oversight that he wasn't in the police reports. Now, if Counsel had done his job he would have known he wasn't in the police reports.

THE COURT: Ms. Trafelet.

MS. TRAFELET: I am sorry, Judge. This makes me very angry.

THE COURT: I also have a jury sitting in the jury room waiting to hear some evidence in this case.

MS. TRAFELET: We are ready.

THE COURT: I am trying to rule here and I asked if you had anything additional or further. Now, if you [230] don't, I am ready to rule.

MS. TRAFELET: Thank you, Judge. I don't have anything further.

THE COURT: All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this is a blatant violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatantly and I am going to put a stop to it and this is one way to do so.

Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.

At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom.

Mr. Van, I have got it in the back of my mind as to whether I should or should not report this to the disciplinary commission. This is the type of violation that should not exist. I heard a lecture the other day. It was about attorneys' duty as far as loyalty [231] to the Court, the institution that we are members of ~~of~~ to the client. I don't think that any attorney should violate any orders purposely for any defendant to get an edge for him. Wormley will not testify here.

MR. VAN: Just to make one comment. Judge, it was not a matter of fact that anyone was trying to get any particular position for his client. As I indicated earlier

to you, I talked to him and many, many people that were in the area at that time and I just felt that Mr. Wormley's testimony would be in fact—However, he did not witness the incident, itself.

THE COURT: Okay, he is not testifying here. You heard my reasons.

MR. DE ROSE: Ready to proceed with witnesses. Again we object to the other witnesses because we don't have any B of I.

THE COURT: You are going to have to go ahead and get those B of I's real quick from them and I will allow you to talk to these witnesses that were named since this trial started. Those that were named before you are not going to have an opportunity to interview them. Those that were named since the trial started you will have an opportunity to interview them before they go on.

MS. TRAFELET: May I say one thing? Counsel, when he [232] gave us the discovery on the two sisters, gave us bogus addresses. They are burned out buildings. I sent my investigator out there and they didn't live at those addresses.

THE COURT: You will be able to talk to them at the present time.

MS. TRAFELET: The last thing, Judge, we do expect Charles Trotter who will testify on behalf of the State today and I am showing a copy of his B of I's to counsel.

THE COURT: Mr. Van, let me say one other thing. I have a little rule. I cannot make anyone talk to the State. I can't make anyone witness talk to the defense but every once in a while I enforce those orders by preventing the witness from getting on the stand when they won't cooperate with the other side. It is my way of enforcing discovery. I am not saying I will; I am not saying I won't, but just be aware of that.

MR. VAN: Thank you.

(Whereupon the following proceedings were had within the presence and hearing of the jury, to-wit:)

* * * * *

March 29, 1984

[396] THE COURT: Have the record indicate that the time is five minutes to 4:00 P.M.; that all of the attorneys are in my chambers, and that approximately ten minutes ago the jury knocked on the jury room door, and that the judge was sitting on the bench; that the jury made an oral request to the lady sheriff, and that they would like a transcript of Jack Bridges and a transcript of Maurice.

My first question, Miss Court Reporter, were you the one that took that testimony?

MS. O'BRIEN: Yes.

THE COURT: Do you have that transcript?

MS. O'BRIEN: No.

MR. VAN: Judge, I have just one question. How long do you think it would take to get a transcript?

[397] THE COURT: We're not talking about getting any transcript here. The only thing I'm talking about is the Court is well aware that—it has discretion in this matter, and the Court is well aware of the fact that the cases indicated it would be helpful to the jury to get a specific portion of any testimony, that the Court should give it to them. And that's my intention.

My only question is that certainly we can't read the whole thing back to them. The only question is what area do they want?

MR. DE ROSE: The only way I think you're going to find out is ask them do they want the entire transcript of each and what specifically are they looking for in what witness.

THE COURT: Okay, we'll go ask them.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

Ladies and gentlemen, it has come to a—my attention that you made an oral request to the sheriff that you would like to hear the—or like to have the transcript of the testimony of Jack Bridges and Maurice.

[398] Number one, I'm going to ask you from now on if you have any questions, that you should put them down on paper, and if you don't have any paper back there, the sheriff will make sure they do.

Number two, the transcripts are never typed unless they are actually needed. I talked to the Court Reporter who actually took that testimony, which is the Court Reporter that is right here in the courtroom right now. She has indicated to me that from her recollection of those transcript—of that, to have those transcripts typed up would take about eight hours.

Now, if there is some specific area that would be helpful to you, the Court Reporter that is here right now, who is the one that took those notes down, could go up to her office, which is in the next building, and up the elevator to the fourth floor, and she could come back here with her notes, and she could look at her notes and read the testimony to you as she has it down.

It's not that easy though to go ahead and read off of those notes. It takes a little while to do so, and it would be rather difficult for her to go all the way from the beginning to the end of Jack Bridges' [399] testimony and all the way from the beginning and end of Maurice's testimony.

However, if there is a specific area that you want, I would probably be able to look at my notes and find it in my notes and direct the Court Reporter where to begin and where to end. If you want me to tell the Court Reporter to go back upstairs, get her notes, and come back here and read a specific section to you, I will.

What I want you to do is go back into the jury room and talk between yourselves. If you still want to hear some specific section, let me know in writing, and I will send the Court Reporter back, and I will see if I can locate that area in the testimony, and we'll call you back

into the courtroom, and I'll have the Court Reporter read it to you.

(Whereupon the case was passed after which the following proceedings were had out of the presence and hearing of the jury:)

Here is what they want, Jack's testimony. A. How many people were chasing Jack down 64th Street? B. What were their names. C. Who did Jack see over [400] him when the gun misfired? Did he actually see someone, or did he just see feet?

Maurice's testimony: Who ran down the street after Jack after the first shot was fired?

And the third thing is, "Judge, these are the areas we would like to have read back."

Bring out the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

Okay, ladies and gentlemen, I had the Court Reporter go upstairs and get her notes, and I looked in my notes, and I found the segment that you were interested in hearing. And the Court Reporter was also able to find it. And if you will be patient for a couple of minutes, we'll get you back into the jury room, and you can get back with your cold supper.

"How many people were chasing Jack down 64th Street? What were their names? Who did Jack see over him when the gun misfired? Did he actually see someone, or did he just see feet?"

There's a segment both in the direct and the cross examination that I believe pertains to that questions. So the Court Reporter will read it for you, [401] and then we'll go to the next question.

(Whereupon said segment of the testimony was read back by the Court Reporter after which the following proceedings were had:)

Let's get back on the record. In relation to Maurice's testimony, "Who ran down the street after Jack after the first shot was fired?"

(Whereupon said segment of the testimony was read back by the Court Reporter after which the following proceedings were had:)

That's the end of the area that pertains to those questions, as far as my notes reflect it, ladies and gentlemen. I would ask you to go back into the jury room and continue to deliberate.

(Whereupon the case was again passed after which the following proceedings were had:)

It looks like we do have a foreman with a jury verdict. The verdict forms appear to be in order.

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 84-1073

PEOPLE OF THE STATE OF ILLINOIS,
v. *Plaintiff-Appellee,*

RAY TAYLOR,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County

THE HONORABLE
JAMES J. HEYDA,
JUDGE PRESIDING

Filed February 10, 1986

JUSTICE CAMPBELL delivered the opinion of the court:

Following a jury trial, defendant, Ray Taylor, was convicted of attempt murder and sentenced to ten years imprisonment. On appeal, defendant contends that: (1) a 22-month pre-indictment delay denied defendant due process of law; (2) the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for violation of the discovery rules; (3) a prior consistent statement of the victim was improperly admitted into evidence; (4) the prosecutor improperly impeached two of defendant's witnesses; (5) defendant

was denied effective assistance of counsel; and (6) certain prosecutorial remarks during closing argument deprived defendant of a fair trial.

At trial, Jack Bridges, the victim testified that on the evening of August 6, 1981, he was standing in front of his sister's house talking with his sister and others when he saw [2] a neighborhood youth, Derrick Travis, sitting on his car. He approached Travis and told him to get off the car. Travis swore at Bridges, Bridges slapped Travis in the face, and Travis walked away. The defendant, who had been playing basketball in a playground across the street, approached Bridges and told Bridges that he had no business slapping Travis. An argument ensued between defendant and Bridges, as well as others who had witnessed the incident. The argument broke up after about 20 minutes and Bridges took a drive in his car to cool off. Bridges returned to the scene about an hour later and was informed by his brother, Maurice Bethany, that he should move his car. Bethany told Bridges that the defendant and his companions had driven by and said they were going to damage Bridge's car. Bridges put his car in a parking lot. As he was returning to his sister's house, he saw defendant and his companion talking to his sister. Bridges called out "I'm over here. Come over here." The group of men, who were carrying sticks and pipes, began walking towards Bridges. Bridges testified that he wanted to apologize to Travis for slapping him, but before he could do so, one of the men swung at him. Bethany then swung at one of the men. Bridges then noticed that defendant had a gun and he saw him fire it at Bethany, but the bullet did not strike Bethany. The men began beating Bridges with the sticks. Bridges broke free, began to run down the street, and the group pursued him. Bridges stated that when defendant was about four feet from him, the defendant fired four shots. The last shot struck Bridges in [3] the back. Bridges fell to the ground and tried to crawl under a car. The defendant then pointed the gun at Bridges head and pulled the trig-

ger, but the gun misfired. He heard the defendant say "he's dead" and then heard a car screech away. The police arrived following the shooting and Bridges told them that "Ray-Ray" had shot him. "Ray-Ray" was defendant's nickname.

Hattie and Regina Algood gave substantially the same testimony on defendant's behalf. They are sisters and had been sitting on the steps of the church across the street from where the altercation occurred. They had lived in the neighborhood for some time and knew most of the people who were on the street that night. They saw a group of men, including defendant, approach Bridges and start hitting him with sticks. They stated that Maurice Bethany, the victim's brother, had a gun and that he fired three shots into the crowd, hitting Jack Bridges with one shot. Hattie and Regina Algood further testified that defendant was a friend and that they were aware the police were looking for defendant the day after the incident. They did not, however, go to the police with the information that Maurice Bethany had shot the victim.

The defendant was indicted on the charge of attempt murder 22 months after the incident. A pre-trial motion to dismiss was filed by defendant alleging that the State's delay in charging defendant was a due process violation because it [4] "made it impossible for the defendant to reconstruct his activities on the date in question and prepare his defense." Defense counsel failed to present any evidence in support of the motion and the motion was denied.

After two of the State's witnesses had testified at trial, defense counsel moved to amend his list of defense witnesses to add two names. Defense counsel explained that the names were not provided prior to trial because two buildings in the neighborhood where the incident took place had burned down and he was having difficulty locating witnesses. The court denied permission for the witnesses to testify, ruling that counsel should have listed

the names of the witnesses in his answer to the State's request for discovery indicating that the addresses of the witnesses were unknown. The court permitted one of the witnesses, Alfred Wormley, to testify out of the presence of the jury as an offer of proof.

I.

Defendent first contends that the 22-month delay in time between the shooting incident and his indictment resulted in substantial prejudice and denied him due process of law. Defendant argues that he was prejudiced because he was unable to locate numerous potential eyewitnesses to the crime as a result of the delay. Prior to trial, defendant moved to dismiss the indictment based on the delay. The trial court denied the motion ruling that defendant failed to present any evidence indicating that he was prejudiced.

[5] In order to support a claim of denial of due process because of a pre-indictment delay, a defendant must come forth with a clear showing of substantial prejudice. If the court is satisfied that the defendant was prejudiced, the burden shifts to the State to show the reasonableness or necessity for the delay. (*People v. Lawson* (1977), 67 Ill. 2d 449, 367 N.E.2d 1244; *People v. Overturf* (1984), 122 Ill. App.3d 625, 461 N.E.2d 640.) In *People v. Reddick* (1980), 80 Ill. App.3d 335, 399 N.E.2d 997, the defendant alleged prejudice because of a delay in charging defendant which caused her to lose track of a material witness. This court held that the defendant did not show substantial prejudice where she did not identify or explain the significance of the unavailable witness at trial or on appeal.

Despite the requirement of a clear showing of substantial prejudice, the defendant here failed to present any evidence of actual prejudice. Defense counsel stated he was unable to locate witnesses because they had moved from burned out buildings. Counsel did not identify the witnesses or make any showing that their testimony

would be helpful to this case. Counsel did state that from a list of twenty potential witnesses, he had spoken to ten. The defendant has demonstrated only a possibility of prejudice. That is not enough to shift the burden to the State to show the reasonableness or necessity for the delay. *People v. DiBenedetto* (1981), 93 Ill. App.3d 483, 417 N.E.2d 654.

[6] Defendant relies on *People v. Gulley* (1980), 83 Ill. App.3d 1066, 404 N.E.2d 1077 where this court held that a pre-indictment delay causes great suspicion and a presumption that the delay was prejudicial. In *People v. Overturf* (1984), 122 Ill. App.3d 625, 461 N.E.2d 640, the court cautioned that the presumption created in *Gulley* does not permit a defendant to avoid the standard of actual prejudice. The court noted that "a careful reading of *Gulley* reveals that despite the court's reference to a presumption of prejudice, * * * it was actually relying upon a well-articulated showing of actual and substantial prejudice which was amply supported by the record." 122 Ill. App.3d 625, 627, 461 N.E.2d 640, 641.

II.

Defendant next contends that the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for a violation of the discovery rules. The Illinois Supreme Court rules require a defendant to respond to the State's motion for discovery by providing a list of intended witnesses within a reasonable time after the filing of the motion. (Ill. Rev. Stat. 1983, ch. 110A, § 413(d)(i).) The defendant sought to add two witnesses to his answer to discovery after the trial had begun and the jury had heard the testimony of two State witnesses. Defense counsel explained he had not located the witnesses prior to trial because of burned out buildings in the neighborhood of the shooting. The trial court denied the motion, but did hear the testimony of one of the witnesses, Alfred Wormley, as an offer of

proof outside the [7] presence of the jury. During his testimony, Wormley indicated that defense counsel had spoken with him and served him with a subpoena a week prior to trial.

When discovery rules are violated, the trial judge may exclude the evidence which the violating party wishes to introduce. (Ill. Rev. Stat. 1983, ch. 110A, § 415(g)(i).) The decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court. *People v. Osborne* (1983), 114 Ill. App.3d 433, 415 N.E.2d 1.

We find unpersuasive defendant's argument that his counsel was justified in violating the discovery rules. The testimony of Wormley establishes that counsel had spoken with him, knew his identity and served him with a subpoena prior to trial. Yet counsel failed to list him as a witness. Defense counsel had the opportunity to list the names of witnesses in his answer to discovery and, if necessary, indicate that their addresses were unknown. We, therefore, believe the trial court was within its discretion in refusing to allow the additional witnesses to testify.

III.

Defendant further argues that the trial court improperly admitted into evidence a statement made by the victim to police shortly after he was shot identifying defendant as the one who shot him since it was a prior consistent statement which bolstered the victim's credibility. Consistent statements of [8] testifying witnesses are generally inadmissible unless they are introduced to rebut a charge of recent fabrication or a claim that a motive to testify falsely has arisen since the prior consistent statement was made. (*People v. Powell* (1973), 53 Ill.2d 465, 292 N.E.2d 409; *People v. Clark* (1972), 52 Ill. 2d 374, 288 N.E.2d 363.) The State contends that the rule against bolstering the credibility of a witness is not applicable since the statement of the victim was an

excited utterance. (*People v. Pointer* (1981), 93 Ill. App.3d 1064, 418 N.E.2d 1.) We agree.

The victim was running from attackers at the time he was shot in the back. As the victim hit the ground, the police arrived. As he was being placed in a paddy wagon for transportation to the hospital, the victim told Officer Jon Davis that "Ray-Ray" shot him. "Ray-Ray" was the defendant's nickname. Both the victim and Officer Jon Davis testified that the victim identified defendant immediately after the shooting as the man who shot him. Under these facts, we believe the victim's statement qualifies as an excited utterance and was properly admitted as evidence by the trial court.

IV.

Defendant next contends that the State improperly impeached two of defendant's witnesses, Hattie and Regina Algood. Both of these witnesses testified that they saw the victim's brother, Maurice Bethany, fire three shots into the crowd during the street altercation and that one of the shots hit Jack Bridges. [9] They further testified that defendant had nothing in his hands when the victim was shot. Defendant objects to the State's questioning of these witnesses on cross-examination. On cross-examination both witnesses admitted they knew that the police were looking for defendant following the incident, but they did not exculpate defendant by going to the police with the information that Maurice Bethany had shot the victim.

A witness' failure to state a particular fact under circumstances rendering it natural or probable that she would state such a fact may be shown to discredit that witness' testimony. (*People v. Green* (1983), 118 Ill. App.3d 227, 454 N.E.2d 792.) We believe the trial court properly permitted the impeachment of these defense witnesses. Hattie and Regina Algood both testified that they knew their friend, the defendant, had been arrested for

the shooting eight months before trial began in this case and neither witness informed the police of the alleged facts which could have exonerated defendant. See *People v. Martinez* (1979), 76 Ill. App.3d 280, 395 N.E.2d 86; *People v. Welte* (1979), 77 Ill. App.3d 663, 396 N.E.2d 315.

V.

Defendant further contends that he was denied effective assistance of counsel. Specifically, defendant complains that defense counsel failed to impeach state witnesses with prior convictions, failed to present evidence of prejudice caused by the pre-indictment delay, violated discovery rules, and failed to object to certain testimony prejudicial to defendant.

[10] Our Supreme Court has adopted the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), — U.S. —, 80 L.Ed. 2d 674, 104 S.Ct. 2052, for evaluating counsel's performance where ineffective assistance of counsel is alleged. (*People v. Albanese* (1984), 104 Ill.2d 504, 473 N.E.2d 1246; *People v. Barnard* (1984), 104 Ill.2d 218, 470 N.E.2d 1005.) The *Strickland* court held that in order to establish ineffectiveness, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Defendant must establish that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.

After reviewing defendant's specific complaints concerning defense counsel's performance at trial, we cannot say that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984), — U.S. —, 80 L.Ed. 2d 674, 692-93, 104 S.Ct. 2052, 2064.) The record as a whole reveals that defense counsel represented defendant sufficiently ably to preclude a finding of incompetency. Further, defendant's complaints are directed at

questions of trial strategy, exercise of judgment and discretion. A reviewing court's examination of competence does not extend to those areas. *People v. Greer* (1980), 79 Ill.2d 103, 402 N.E.2d 211.

VI.

[11] Finally, defendant contends that it was prejudicial error for the prosecutor to comment during closing argument that the motive for the shooting was gang-related and that witnesses refused to testify out of fear of retaliation. From the record, we note that there was a single reference to the word "gangs" in the prosecutor's closing argument.

It is well-settled that great latitude is afforded a prosecutor during closing argument. (*People v. Adams* (1983), 111 Ill. App.3d 658, 444 N.E.2d 534.) Even if the comments by the prosecutor in the instant case are deemed improper, the error was harmless. An error in closing argument is not reversible unless the improper comments result in substantial prejudice to the defendant. (*People v. Turner* (1984), 127 Ill. App.3d 784, 469 N.E.2d 368.) In deciding whether defendant was prejudiced, it is appropriate to assess the evidence of his guilt and to determine whether the error was a material factor in his conviction. (*People v. Graham* (1985), 132 Ill. App.3d 673, 477 N.E.2d 1342. In this case, the State produced ample evidence of defendant's guilt, and the prosecutor's singular reference to gang activity cannot be considered to be a material factor in defendant's conviction.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

BUCKLEY, P.J., and O'CONNOR, Jr., J., concur.

63507

ILLINOIS SUPREME COURT

JULEANN HORNYAK, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1986

Hon. James J. Doherty
Cook County Public Defender
Richard J. Daley Center Rm 403
Chicago, IL 60602

No. 63507—People State of Illinois, respondent, v. Ray Taylor, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

SUPREME COURT OF THE UNITED STATES

No. 86-5963

RAY TAYLOR,

Petitioner

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF THE STATE OF
ILLINOIS, FIRST DISTRICT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

January 27, 1987

PETITIONER'S BRIEF

APR 8 1987

JOSEPH F. WARD, JR.
CLERK

No. 86-5963

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

RAY TAYLOR,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court of Illinois,
First District

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Does the Sixth Amendment Compulsory Process Clause permit a State to preclude the testimony of a material defense witness in order to enforce its discovery rules where less drastic sanctions were available and appropriate?

2. If the preclusion of the testimony violated the Compulsory Process Clause, was the error harmless beyond a reasonable doubt?

TABLE OF CONTENTS

	Page
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATUTE INVOLVED.....	2
STATEMENT.....	2
SUMMARY OF ARGUMENT.....	10
ARGUMENT	
THE PRECLUSION OF A MATERIAL DEFENSE WITNESS MERELY TO ENFORCE A STATUTORY DISCOVERY RULE VIOLATED THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT WHERE LESS DRASTIC SANCTIONS WERE AVAILABLE AND APPROPRIATE.	13
A. THE CRITICAL IMPORTANCE OF THE COMPULSORY PROCESS CLAUSE TO OUR ADVERSARY SYSTEM REQUIRES EITHER A PROHIBITION OF THE PRECLUSION SANCTION OR A BALANCING TEST HEAVILY WEIGHTED IN FAVOR OF A PRESUMPTION AGAINST PRECLUSION. THE USE OF THE PRECLUSION SANCTION HERE VIOLATED THE SIXTH AMENDMENT UNDER ANY SUCH TEST.	15
B. THE SIXTH AMENDMENT VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE EVIDENCE WAS CLOSELY BALANCED, THE EXCLUDED WITNESS' TESTIMONY WAS MATERIAL AND HIGHLY PROBATIVE, AND THE JURORS DURING DELIBERATIONS INDICATED THAT THEY HAD DOUBTS ABOUT THE TESTIMONY OF THE PROSECUTION'S TWO KEY WITNESSES. .	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases	Page
<i>Braswell v. Wainwright</i> , 463 F.2d 1148 (5th Cir. 1972) ..	18
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	15, 20
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	23
<i>Fendler v. Goldsmith</i> , 728 F.2d 1181 (9th Cir. 1984).....	16, 18, 19, 20, 21, 23, 25
<i>Holder v. United States</i> , 150 U.S. 91 (1893)	17
<i>Pennsylvania v. Ritchie</i> , — U.S. —, 40 Cr.L. Rep. (BNA) p. 3277 (1987).....	15
<i>Robbins v. Cardwell</i> , 618 F.2d 581 (9th Cir. 1980)	20
<i>Ronson v. Commissioner of Cor. of State of N.Y.</i> , 604 F.2d 176 (2nd Cir. 1979)	21
<i>Schneble v. Florida</i> , 405 U.S. 427 (1972).....	23
<i>United States v. Davis</i> , 639 F.2d 239 (5th Cir. 1981).....	16, 18, 25
<i>United States ex rel. Enoch v. Hartigan</i> , 768 F.2d 161 (7th Cir. 1985).....	20, 21, 22, 24
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	15
<i>United States v. Nobles</i> , 422 U.S. 225 (1975)	17
<i>Washington v. Texas</i> , 388 U.S. 14 (1967).....	14, 15, 24
Statutes	
Ill. Rev. Stat. 1983, Ch. 110A, Sec 413(d)(i)	13
Ill. Rev. Stat. 1983, Ch. 110A, Sec. 415(g).....	14, 18
MISCELLANEOUS	
ABA <i>Standards for Criminal Justice</i> , Sec. 11-4.7 (a) (2nd ed. 1980).....	16
Note, <i>The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense</i> , 81 Yale L.J. 1342 (1972).....	16, 17, 19
Pulaski, <i>Extending the Disclosure Requirements of the Jencks Act To Defendants: Constitutional and Non-constitutional Considerations</i> , 64 Iowa L. Rev. 1 (1978)	16
Reznick, <i>The New Federal Rules of Criminal Procedure</i> , 54 Geo. L.J. 1276 (1966)	18
Weinstein, <i>Some Difficulties in Devising Rules for Determining Truth in Judicial Trials</i> , 66 Colum. L.Rev. 223 (1966).....	17
Westen, <i>The Compulsory Process Clause</i> , 73 Mich. L.Rev. 71 (1974)	16

OPINION BELOW

The opinion of the Appellate Court of Illinois is reported as *People v. Taylor*, 141 Ill. App. 3d 839, 491 N.E. 2d 3 (1986). The opinion is set forth in the Joint Appendix at pages 34 to 42.

JURISDICTION OF THE COURT

The opinion of the Appellate Court of Illinois was filed on February 10, 1986. A petition for rehearing was denied on April 4, 1986. A timely Petition for Leave to Appeal was denied by the Illinois Supreme Court on October 2, 1986. The petition for writ of certiorari was filed within 60 days thereafter and was granted on January 27, 1987. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Illinois Revised Statutes, 1983, Chapter 110A (Illinois Supreme Court Rules), Article IV (Rules On Criminal Proceedings In The Trial Court), Part B (Discovery), Section 415 (Regulation of Discovery), subsection (g):

(g) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

(ii) Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

STATEMENT OF THE CASE

On August 6, 1981, Jack Bridges was shot during a street altercation on the south side of Chicago. Although Bridges allegedly told police on the night of the shooting that the petitioner, Ray Taylor, was the culprit (J.A. 36) and although Ray Taylor lived openly with his family in Chicago after the incident (R. 414-21) no warrant was ever issued for Taylor's arrest and no charge was ever filed against him until over 22 months later, when he was indicted for attempt murder and lesser offenses on June 14, 1983. (J.A. 1-3)

Attorney Vester Van filed his appearance for Mr. Taylor on August 25, 1983. (J.A. 1) Mr. Van filed a pre-trial motion to dismiss the indictment on the ground that the State's unjustified 22 month delay in charging Mr. Taylor violated due process. (J.A. 4-5) The court denied the motion after Mr. Van declined to present any evidence in support of the motion. (J.A. 10-11) Both parties filed pre-trial answers to discovery requests, listing the witnesses they intended to call at trial, pursuant to Ill. Rev. Stat., 1983, Ch. 110A, Secs. 412, 413. (J.A. 4-5; R. 468-470)

The trial, which began on March 26, 1984, presented the jury with a credibility question as to who shot Jack Bridges. The undisputed facts concerning the incident were that Jack Bridges, a 30 year old, 290 lb. man employed as a security guard for a liquor store, was standing in front of his sister's house talking with a group of relatives and friends when he saw a 15 year old neighborhood youth, Derrick Travis, sitting on his Cadillac. (J.A. 35; R. 134, 151) He walked up to Travis and ordered him off the car. Travis swore at Bridges, Bridges slapped Travis in the face, Travis began to walk away. Ray Taylor, who had been playing basketball in a playground across the street, approached Bridges and told him he had no business slapping the youth. A twenty minute argument ensued in which Taylor was joined by Samuel Nesby and John Williams whereas Bridges was joined by his brother Marvin and his sister, Jacqueline Jones. After the argument broke up, Bridges drove off in his car "to cool off". (J.A. 35) He returned about 45 minutes later and went into his sister's house. An hour after that, his brother Maurice Bethany came into the house and told him that Samuel Nesby, John Williams, Earl Travis, and Ray Taylor had driven by the house and threatened to damage Bridges' car. (R. 139-140) Bridges left to drive home but

he then decided to hide his car in a parking lot and return to his sister's on foot. (J.A. 35; R. 141)

When he was across the street from his sister's, he saw Taylor, Nesby, Williams, and Earl and Derrick Travis talking to his sister and another brother, Maurice Bethany. Bridges yelled to come over to him, and the men approached him along with Maurice Bethany. The men were carrying sticks and pipes. They began to beat Bridges and he was eventually shot during the incident. (J.A. 35)

The State's theory as to who shot Bridges was that during the fight, in which four friends of Ray Taylor were beating Bridges, Ray Taylor pulled a gun and fired it "point blank" at Maurice Bethany, but missed. He then chased Jack Bridges and fired four shots, the last of which hit Bridges in the back. After Bridges fell, he pointed the gun at Bridges' head and pulled the trigger, but the gun misfired. (J.A. 35-36) This theory was presented through the testimony of Jack Bridges, Maurice Bethany, Bridges' sister, Jacqueline Jones, and another relative, Charles Trotter. (R. 132, 166, 233, 255) At trial, Bridges and Bethany both denied that they possessed weapons on the night of the incident. (R. 133, 193)

The defense theory was presented through the eyewitness testimony of two sisters, Hattie and Regina Algood, who were sitting on church steps in front of the place where the altercation occurred. They lived in the neighborhood and knew most of the people who were on the street that night. They were friends of Ray Taylor. They saw a group of men, including Ray Taylor, approach Bridges and start hitting him with sticks. They denied that Ray Taylor had a gun. They stated that Maurice Bethany approached with a gun and fired three shots into

the crowd, hitting Jack Bridges with one shot. (J.A. 36; R. 282-296, 303-316)

At the conclusion of the second day of trial, after two of the five State witnesses had testified and the day before the defense presented its case, Mr. Van moved to amend his list of witnesses to include Alfred Wormley and Pam Berkhalter. In response to the court's inquiry as to why the witnesses were not listed before trial, defense counsel stated that Mr. Taylor had told him of Alfred Wormley "sometime ago" but that Mr. Taylor had been unable to locate him. The court ordered that the witnesses be produced for examination the following day to determine if they would be allowed to testify. (J.A. 12-14)

The following day, defense counsel informed the court that Alfred Wormley was present to testify. The prosecution objected. Defense counsel responded that there had been numerous fires in the area in the almost three years since the incident, so that "it has been a traumatic experience for myself to even locate the witnesses. A lot of them have moved and left no forwarding addresses." (J.A. 16)

THE COURT: Mr. Van, you are forgetting one thing. You could always name the witness and indicate no address available at present. To do what you did is inexcusable and I have had, for the record, so many violations of discovery rules by the defense in the last few trials that it is unbelievable. Since the opinion on Judge Schiller came down where he got reversed for not allowing the defense to put in an affirmative defense when they brought it up in the last moment, I have had in the last two trials affirmative defenses that came in after the trial started. Now in this case all you had to do was put down the name of the witness, even put down his last known address and indicate that you are seeking the present address and you wouldn't have any problem here, but now what am I going to do? I am interested in finishing the case

because I have got to try. I have a fourth term case [a case in which the statutory speedy trial term was running] that I would like to start working on Friday and here I am.

Now, the Appellate Court will always say well, the Judge should have given 24 hours or allowed the State to talk to that witness ahead of time but that still does not accomplish getting the State a B of I. In 24 hours they could do it. Now I am sitting here and the jury is cooped up in the jury room. They are ready to go. I quit yesterday at 2:30. Am I going to send them home now without hearing anything and just have a super waste of judicial time? What you did is inexcusable as far as this Court is concerned. (J.A. 16-17)

The court ordered that Mr. Wormley testify out of the presence of the jury as an offer of proof. (J.A. 17) Alfred Wormley testified that he lived in the neighborhood of the incident. He was walking home at about 8:00 p.m. that night when he saw a group of people standing on Jacqueline Jones' front porch. He joined the group which included Jack Bridges, whom Mr. Wormley identified in court, and Bridges' sister and two brothers. He said that he saw Jack Bridges in possession of a blanket which contained two pistols. He also heard the group "saying what they were going to do to the people. Say they were after Ray and the other people." Wormley left and continued on his way home when he ran "into Ray and them and so I told them what was happening and to watch out because they got weapons." Taylor and the others then continued down a side street. (J.A. 18-19)

On cross-examination by the prosecutor, Alfred Wormley testified that he was 21 years old and that he had no prior convictions. He recited his date of birth. He stated that he had moved out of the neighborhood to a north side

address shortly after the incident and that he had just recently moved back into the neighborhood. He stated that he learned he was going to testify the week before trial when Mr. Van came to his house and asked him to testify. (J.A. 20-21)

The court then examined Mr. Wormley and ascertained that Mr. Van had served him with a subpoena the week before. Wormley produced the subpoena for the court. The subpoena called for Mr. Wormley to testify on the day he had appeared (J.A. 22)

Upon further questioning by the Court, Mr. Wormley said that he was not acquainted with Ray Taylor at the time of the incident. He stopped and warned the group Ray Taylor was with because he knew other guys in the group. He had become acquainted with Ray Taylor within the last four months. He never discussed the case with Taylor and he did not know how Mr. Van learned that he had information about the case. (J.A. 23)

Mr. Wormley stated that he saw Jack Bridges hand the blanket containing two pistols to Donna Kerr. Wormley believed that Kerr was Bridges' girlfriend. (J.A. 23-24)

On redirect examination by Mr. Van, Mr. Wormley said that he knew four of the men with Ray Taylor. That is why he warned them. He named those men as Earl Travis, Derrick Travis, and two brothers named Samuel and Ivory. On further examination by the prosecutor, he said that he knew Ray Taylor by sight in 1981 but that he had not met him then. (J.A. 25)

After the offer of proof, the prosecutor requested that the witness be precluded from testifying because Mr. Van had concealed the fact that he had served the witness at his home with a subpoena the week before trial and had lied when he said he did not have an address. She said that

if "you let this witness testify we may all take these discovery rules and throw them away, Judge." (J.A. 25-26)

In response, Mr. Van said that he did not add Wormley's name earlier because he mistakenly believed that his name had been included in the police reports tendered to him by the State. He asked that Wormley be allowed to testify because, although he did not see the shooting, "he is a good part of my defense in this case." (J.A. 26-27)

The prosecutor expressed anger over Mr. Van's claim that he thought Wormley's name was in the police reports, saying "if counsel had done his job he would have known he wasn't in the police reports." (J.A. 27-28) The Court ruled as follows:

THE COURT: All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this is a blatant violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatantly and I am going to put a stop to it and this is one way to do so.

Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.

At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom.

Mr. Van, I have got it in the back of my mind as to whether I should or should not report this to the disciplinary commission. This is the type of violation that should not exist. I heard a lecture the other day. It was about attorneys' duty as far as loyalty to the Court, the institution that we are members of or to

the client. I don't think that any attorney should violate any orders purposely for any defendant to get an edge for him. Wormley will not testify here.

MR. VAN: Just to make one comment. Judge, it was not a matter of fact that anyone was trying to get any particular position for his client. As I indicated earlier to you, I talked to him and many, many people that were in the area at that time and I just felt that Mr. Wormley's testimony would be in fact—However, he did not witness the incident, itself.

THE COURT: Okay, he is not testifying here. You heard my reasons. (J.A. 28-29)

After the court had ruled, the State presented its final three witnesses, and the defense presented its two witnesses. No other eyewitnesses testified although it was undisputed that 25 to 30 people were on the street at the time of the shooting. (R. 194-195) No physical evidence was presented to corroborate either sides' version of who did the shooting.

After the jurors retired for their deliberations they requested and received from the trial judge a verbal reading of testimony of the State's two key witnesses, Jack Bridges and Maurice Bethany. After further deliberations, the jury eventually returned a guilty verdict. (J.A. 30-33)

The jury deliberated and returned its verdict without considering the effect of prior convictions on the testimony of the four State witnesses. Jack Bridges, also known as Jack Belton, had an aggravated battery conviction for which he served 18 months in the penitentiary. Maurice Bethany had a prior theft conviction for which he was placed on probation in 1978. Jacqueline Jones had three prior theft convictions for which she had received probation in the last 3 to 5 years. Although the prosecu-

tion revealed these convictions to defense counsel prior to trial (R. 120-1) and conceded that they were admissible (R. 129), defense counsel never attempted to introduce this evidence. In addition, the State tendered an unspecified provable conviction of Charles Trotter just before he testified but defense counsel failed to introduce it. (R. 232) The Court precluded defense counsel from mentioning any of the prior convictions of the State witnesses in closing arguments because no evidence of these convictions had been introduced by the defense at trial. (R. 336-8; J.A. 41)

After Mr. Taylor was sentenced to 10 years imprisonment for attempt murder, an appeal was taken to the Appellate Court of Illinois, First Judicial District. Mr. Taylor raised six issues, including the issue that the use of preclusion sanction for the discovery violation violated due process and the issue that counsel was ineffective, in part for failing to comply with the discovery rules. The Appellate Court affirmed without addressing the constitutional implications in the trial judge's decision to preclude the defense witness from testifying. (J.A. 38-39)

Following the denial of a petition for rehearing by the Appellate Court, Mr. Taylor filed a Petition for Leave to Appeal in the Illinois Supreme Court challenging the constitutionality of the use of the preclusion sanction and the constitutional effectiveness of trial counsel. This petition was denied. (J.A. 43)

SUMMARY OF ARGUMENT

During the presentation of the State's case in Ray Taylor's jury trial for attempt murder, the trial court ordered that a material defense witness be precluded from testifying as a sanction for defense counsel's failure to comply with an Illinois statutory discovery rule. Before preclud-

ing the witness from testifying, the court permitted him to testify and be cross-examined outside the presence of the jury as an offer of proof. That offer showed that the witness' testimony would have strongly corroborated the testimony of the two defense witnesses and would have strongly impeached the testimony of the two key prosecution witnesses in a case in which credibility of the witnesses was the only issue.

In light of the fundamental importance of the Compulsory Process Clause of the Sixth Amendment to the truth-seeking function of our adversary system, the preclusion sanction employed in this case in order to further compliance with a general discovery rule should be constitutionally prohibited. A defendant's failure to comply with discovery rules will usually have nothing to do with the probative value of the evidence excluded. Since general discovery rules are not designed to protect the integrity of the evidence sought to be excluded, but rather are designed to prevent surprise, the preclusion sanction may lead to an unfair conviction, the very result discovery rules are designed to prevent. The preclusion sanction is also unnecessary because there are other equally effective sanctions which are less restrictive of a defendant's rights. They include stiff disciplinary actions against the offending attorney, full disclosure of the material sought to be introduced, the granting of continuances, permitting prosecutorial comment during trial on the defendant's failure to comply, possible contempt citations against the defendant, and the limiting of further discovery by the defendant. In addition, the preclusion sanction punishes the defendant for a wrong likely committed by his attorney, creating additional constitutional problems such as inviting ineffective assistance of counsel arguments. For example, such an argument has been advanced in the present case.

If this Court decides that preclusion need not be prohibited or that the question of its complete prohibition need not be reached, it should nevertheless hold that use of the preclusion sanction in this case violated the Sixth Amendment. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) requires at a minimum that a balancing test be adopted to determine whether the interest sought to be furthered by use of the preclusion sanction is paramount to the defendant's compulsory process right.

Application of the balancing test must begin with a presumption against exclusion of otherwise admissible evidence in order to insure proper recognition of the fundamental right involved. Other factors include the effectiveness of less severe sanctions, the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the materiality of the testimony to the outcome of the case, and the evidence of bad faith in the failure to comply with the rules.

Applying these factors to the present case shows that the preclusion of the witness violated the Sixth Amendment. The precluded evidence was material. The complaining witness and his brother testified that they did not have guns on the night of the shooting and that Ray Taylor shot the complaining witness. Two eyewitnesses testified for the defense that Ray Taylor did not have a gun, but that, as Taylor and his friends were beating the complaining witness, his brother drew a gun and fired into the crowd, hitting the complaining witness by mistake. The excluded witness' testimony was highly probative and material because he would have testified that, shortly before the shooting incident he observed the complainant and his family plotting to "go after" Ray Taylor and his friends. He saw the complaining witness hand his girlfriend a blanket containing two pistols.

Less severe sanctions would have been equally effective. The record shows that Ray Taylor was not to blame for the rule violation. His attorney was. Therefore, disciplinary sanctions against the attorney would have been more effective than the preclusion sanction in furthering compliance with the discovery rules.

The State never claimed any prejudice in the trial court or the Illinois Appellate Court. The initial surprise in learning of the witness was dissipated when the trial court required the witness to testify outside the presence of the jury and to be subjected to cross-examination. This sanction alone was more than sufficient to overcome any damage done as a result of the discovery violation.

Although the record demonstrates wilful conduct by the defense attorney, this factor is insufficient to overcome the other factors which weigh heavily against the preclusion sanction. Therefore, the trial court's preclusion order violated the Sixth Amendment.

This fundamental error was not harmless beyond a reasonable doubt because the evidence was closely balanced, the precluded testimony was crucial to Ray Taylor's defense, and the jurors during deliberations expressed doubts about the strength of the State's case when they requested and were given portions of the testimony of the two key prosecution witnesses, to be considered a second time before they felt confident enough to return a guilty verdict.

ARGUMENT

THE PRECLUSION OF A MATERIAL DEFENSE WITNESS MERELY TO ENFORCE A STATUTORY DISCOVERY RULE VIOLATED THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT WHERE LESS DRASTIC SANCTIONS WERE AVAILABLE AND APPROPRIATE.

Defense Counsel at trial in the present case violated an Illinois statutory discovery rule [Ill. Rev. Stat., 1983, Ch.

110A, Sec. 413(d)(i)] by failing to tender to the prosecution before trial the name and address of a witness he sought to call, even though he was aware five days before trial that he planned to call the witness. The trial judge, after hearing the sworn testimony of the witness as an offer of proof, ordered that the witness be precluded from testifying as a sanction for the discovery violation. (J.A. 28-29) The judge acted pursuant to the authority of Ill. Rev. Stat., 1983, Ch. 110A, Sec. 115(g) which provides:

(g) *Sanctions.*

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

(ii) Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

The issue now before this Court is whether the judge's ruling pursuant to the statute violated Mr. Taylor's right under the Sixth Amendment, made applicable to the States through the Fourteenth Amendment [*Washington v. Texas*, 388 U.S. 14 (1967)], "to have compulsory process for obtaining witnesses in his favor."

In the first part of this argument, we will show that under whatever test is formulated for determining when the preclusion sanction may be constitutionally applied, its application in the present case was constitutionally impermissible. In the second part, we will demonstrate that the error in precluding the testimony was not harmless beyond a reasonable doubt.

A. THE CRITICAL IMPORTANCE OF THE COMPULSORY PROCESS CLAUSE TO OUR ADVERSARY SYSTEM REQUIRES EITHER A PROHIBITION OF THE PRECLUSION SANCTION OR A BALANCING TEST HEAVILY WEIGHTED IN FAVOR OF A PRESUMPTION AGAINST PRECLUSION. THE USE OF THE PRECLUSION SANCTION HERE VIOLATED THE SIXTH AMENDMENT UNDER ANY SUCH TEST.

This Court has recognized that the ends of criminal justice in our adversary system "would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Therefore, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This right is "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). See *Pennsylvania v. Ritchie*, ___ U.S. ___, 40 Cr. L. Rep. (BNA) pp. 3277, 3282 ("our cases establish, at a minimum, that criminal defendants have * * * the right to put before a jury evidence that might influence the determination of guilt.")

Given the fundamental importance of the right to present defense witnesses to the truth-seeking function of the trial and the availability of adequate less drastic sanctions for a criminal defendant's violation of a general discovery rule, prohibition of the preclusion sanction is appropriate.

The Fifth Circuit has expressly held that "the sixth amendment forbids the exclusion of otherwise admissible

evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States v. Davis*, 639 F.2d 239, 243 (5th Cir., 1981). Many commentators have agreed with this view. See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 139 (1974) ("Whatever the particular sanction or combination of sanctions utilized to deter non-compliance with [a discovery] rule, total preclusion of exculpatory evidence is unnecessarily harsh."); Pulaski, *Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Nonconstitutional Considerations*, 64 Iowa L. Rev. 1, 53 (1978) ("using a preclusion sanction to enforce [a discovery rule] may be constitutionally excessive."); ABA *Standards for Criminal Justice*, Sec. 11-4.7(a) (2nd ed. 1980) ("The exclusion sanction is not recommended because its results are capricious * * * exclusion of defense evidence raises significant constitutional issues."); Note, *The Preclusion Sanction—A Violation of the Constitutional Right To Present A Defense*, 81 Yale L.J. 1342, 1364 (1972) ("the sanction of preclusion, based on [a] discredited doctrine, has been embodied in numerous state and federal pretrial discovery statutes. The result is evident: an infringement of the defendant's constitutional rights.")

Aside from recognizing the fundamental nature of the right involved, a rule prohibiting the preclusion sanction is appropriate for a number of practical reasons. Foremost among these is that "a defendant's failure to comply with discovery rules will usually have nothing to do with the probative value of the evidence to be excluded." *Fendler v. Goldsmith*, 728 F.2d 1181, 1185 (9th Cir., 1983) Therefore, the "exclusion of defense evidence may lead to an unfair conviction" which would obviously "defeat the objectives of discovery." ABA *Standards for Criminal Justice*,

supra. See also Weinstein, *Some Difficulties in Devising Rules for Determinating Truth in Judicial Trials*, 66 Colum. L. Rev. 223, 237 (1966) ("Whether [a preclusion order] is sound or not (and putting aside possible constitutional objections), at the very least it would constitute a conscious mandatory distortion of the fact-finding process whenever applied."); Note, *The Preclusion Sanction—A Violation Of The Constitutional Right To Present A Defense*, 81 Yale L.J. 1342, 1361 (1972) ("The preclusion sanction alone threatens to permit the conviction of an individual who is innocent of the crime for which he is charged because of his commission of a separate wrong—the failure to comply with pretrial discovery.")

Generally the preclusion of testimony of defense witnesses has been permitted only where the integrity of the evidence involved has been threatened. Thus, in *United States v. Nobles*, 422 U.S. 225 (1975), the Court upheld a trial court's preclusion of a defense investigator's testimony about a government witness' prior statements because the defense refused to produce the investigator's written report for use by the government in cross-examination. The Court specifically noted that the trial judge "did not bar the investigator's testimony" but rather "merely prevented [defendant] from presenting a partial view of the credibility issue . . ." 422 U.S. at 241. The Court stated that the "Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.*

Similarly, in cases involving defense violations of witness sequestration orders, courts may preclude the witnesses involved from testifying if their testimony was tainted by the lack of sequestration. See, e.g., *Holder v.*

United States, 150 U.S. 91 (1983); *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir., 1972).

Thus, "the exclusion of relevant, probative, and otherwise admissible evidence is an extreme sanction that should be used only when justified by 'some overriding policy consideration.' Where a defendant has knowingly exposed his evidence to an outside, coloring influence, he has erected an obstacle to the search for truth that the trial court might rightfully remove." *United States v. Davis*, *supra*, 639 F.2d at 243. However, general discovery rules are not designed to protect the integrity of the evidence sought to be presented, but rather they are designed to prevent surprise. *Id.* See also *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1186. Therefore, the preclusion sanction does not further the interests sought to be protected by such rules.

Another reason the preclusion sanction is unnecessary is that there are other equally effective sanctions available. "Stiff disciplinary sanctions against the offending defense attorney seem a more effective deterrent." Reznick, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276, 1294 (1966). In the present case, such sanctions were available to the trial judge [Ill. Rev. Stat., 1983, Ch. 110A, Sec. 415(g)(ii)] and he threatened to use them (J.A. 28) ("I have got it in the back of my mind as to whether I should or should not report this to the disciplinary commission"), before choosing to preclude the testimony. No explanation was given by the court for choosing the preclusion sanction over the attorney disciplinary sanction. The latter would surely have been more effective as a deterrent.

Other possible sanctions include disclosure of material not previously disclosed, granting a continuance, limiting

further discovery by the defendant, prosecutorial comment during trial on the defendant's failure to comply, and possible contempt or criminal actions against the defendant. *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1186-7; Note, *The Preclusion Sanction—A Violation Of The Constitutional Right To Present A Defense*, 81 Yale L. J. at 1356-60. In the present case, Mr. Taylor was required to fully reveal the contents of the testimony sought to be introduced in the offer of proof, thus eliminating any surprise to the State. Nevertheless, the preclusion sanction was additionally imposed with no discussion or consideration by the court of any of the other available sanctions. (J.A. 25-29)

Clearly the present case is a perfect example of why the preclusion sanction is unnecessary. After the witness' testimony was presented in the offer of proof (J.A. 17-25), the purposes of the discovery rules had been fulfilled. The State was now on notice as to the contents of the defense witness' testimony, the State was fully aware of the witnesses of its own needed to refute that testimony (namely, the complaining witness and his family), and the trial would not have to be delayed since the witness was present and ready to testify. Therefore, preclusion was totally unjustified and unnecessary in the present case.

One final reason to prohibit the preclusion sanction is that it places the entire penalty on the defendant by severely hampering his case even though his attorney's negligence or wilful wrongdoing may have been the cause of the discovery violation. This likelihood creates additional constitutional problems such as "whether a defendant could be subject to [the preclusion sanction] absent any showing that he had been advised of the rules and instructed to cooperate with counsel in complying with them." *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1187,

quoting from *Robbins v. Cardwell*, 618 F.2d 581, 583, n.4 (9th Cir., 1980). Use of the sanction also invites attacks on convictions based on the incompetence of counsel. *Fendler*, *id.*

In fact, the record, in the present case shows that Mr. Taylor acted in good faith, telling his attorney well before trial of the existence of the witness and locating him and making him available for counsel at least a week before trial. (J.A. 13) In addition, ineffective assistance of counsel due to the invocation of the preclusion sanction has been consistently raised in Mr. Taylor's appeals.

Given the availability of other equally effective sanctions which do not drastically infringe on a defendant's constitutional rights, the preclusion sanction should be prohibited.

If this Court finds it unnecessary to prohibit the preclusion sanction in order to decide this case, then the importance of the Sixth Amendment right warrants the adoption of a balancing test premised upon the admonition stated in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973): "Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. (citation) But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined."

Such a test has been adopted by the Seventh Circuit in *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir. 1985), cert. denied, sub nom. *Lane v. Enoch*, ___ U.S. ___, 89 L.Ed.2d 588 (1986), and by several state courts. (See cases collected in *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1187) The balancing test has also been

applied in *Fendler v. Goldsmith* and in *Ronson v. Commissioner of Cor. of State of N.Y.*, 604 F.2d 176, 178 (2nd Cir., 1979).

Recognizing the fundamental importance of the right to present a defense, the balancing test "must begin with a presumption against exclusion of otherwise admissible defense evidence." *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1188. Other factors to then be weighed include the effectiveness of less severe sanctions, the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the materiality of the testimony to the outcome of the case, and the evidence of bad faith in the violation of the discovery rules. *United States ex rel. Enoch v. Hartigan*, *supra*, 768 F.2d at 163; *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1187.

Applying the factors of the balancing test to the present case demonstrates that the trial court committed constitutional error by precluding the defense witness, Mr. Wormley, from testifying.

First, less severe sanctions were available and they would have been at least as effective as the preclusion sanction in insuring future compliance with the discovery rules, a concern which the trial judge repeatedly stated was his main focus in imposing sanctions. (J.A. 16, 28) The disciplinary sanctions with which the trial judge threatened defense counsel (J.A. 28) would surely have been a more direct deterrent to the violation of the rules, particularly in light of the fact that there was no evidence that Mr. Taylor himself was in any way responsible for the discovery violation.

Second, whatever initial surprise the State experienced had been quickly overcome when the court required Mr. Wormley to testify outside of the presence of the jury and

to be subjected to probing cross-examination. (J.A. 17-25) Indeed, it is difficult to conceive of a more effective discovery tool than this preliminary, under-oath examination. In addition, the prosecution never claimed that it was prejudiced by the late tendering of the witness when it argued for his exclusion. (J.A. 13, 15-16, 25-28) While the trial judge stated at the end of his ruling that "I don't think any attorney should violate any orders purposely for any defendant to get an edge for him" (J.A. 28), there is no evidence to support the judge's conclusion that the defendant had gotten an edge. See *United States ex rel. Enoch v. Hartigan*, *supra*, 768 F.2d at 163 (trial judge's statement that there was some "design" in the discovery violation was "unsubstantiated and without any evidentiary basis.")

The State was fully informed of the *contents* of the defense witness' testimony before the State had even rested its case. The witnesses the State needed to refute the contents of that testimony were readily available. Indeed, they were the witnesses the State was employing in its case-in-chief. Thus, the late tendering of the defense witness did not prejudice the prosecution.

Third, the excluded witness' testimony was relevant and highly probative to the outcome of the case. He placed two pistols in the hands of the complaining witness and his family not long before the shooting incident. (J.A. 19, 23-24) He also testified that the family was plotting to go "after Ray" Taylor and his friends. (J.A. 19) This testimony would have directly contradicted the testimony of the complaining witness and his brother, Maurice Bethany, that they were not carrying weapons on the night in question, (R. 133, 193) and it would have corroborated the two defense witnesses who testified that Maurice Bethany shot his brother in a futile attempt to protect him

from a beating. (J.A. 36) Thus, the substantial materiality of the excluded witness' testimony on the outcome of the case weighed heavily against the use of the preclusion sanction.

The final factor, bad faith, may be imputed to defense counsel to some degree in light of his negligence in failing to comply with the rules and his attempt to lie about that negligence. However, counsel's failures certainly cannot be imputed to Mr. Taylor, who had provided counsel with the witness' existence well before trial. In any event, the possible wilfulness in counsel's behavior cannot alone justify the preclusion sanction where, as here, all of the other factors weigh heavily against preclusion. See *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1190.

For all of the reasons stated in this argument, the trial court violated Ray Taylor's Sixth Amendment right to compulsory process by precluding Alfred Wormley from testifying. The Illinois Appellate Court's holding that the trial judge did not abuse his discretion in entering the preclusion order (J.A. 39) therefore cannot stand.

B. THE SIXTH AMENDMENT VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE EVIDENCE WAS CLOSELY BALANCED, THE EXCLUDED WITNESS' TESTIMONY WAS MATERIAL AND HIGHLY PROBATIVE, AND THE JURORS DURING DELIBERATIONS INDICATED THAT THEY HAD DOUBTS ABOUT THE TESTIMONY OF THE PROSECUTION'S TWO KEY WITNESSES.

Because the error in precluding the defense witness from testifying affected a substantial constitutional right, Mr. Taylor's conviction can be affirmed only if the error is found to be "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). *Schneble v.*

Florida, 405 U.S. 427 (1972). The record does not permit such a finding.

The credibility question presented to the jury was a close one, arraying the complaining witness and his three close relatives against two young women from the neighborhood of the incident. None of the witnesses were significantly impeached during the trial.¹

The excluded testimony of Alfred Wormley was material and highly probative. (J.A. 18-25) This testimony both corroborated the other defense witnesses and it directly impeached the two key prosecution witnesses.

Finally, an occurrence during the jurors' deliberations demonstrated the potential importance of the excluded evidence. The jurors asked for and were given significant portions of the testimony of the complaining witness and his brother. (J.A. 30-33) It was only after hearing this testimony for a second time and deliberating further that the jurors felt confident enough to return a guilty verdict. Had they heard the excluded evidence, their verdict may well have been different.

In this case, "the State arbitrarily denied [the petitioner] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington v. Texas*, 388 U.S. 14, 23 (1967). In light of the facts outlined above, it cannot be said that this error was harmless beyond a reasonable doubt. See *United States*

¹ Although all four of the prosecution witnesses had prior convictions with which their credibility could have been impeached (R. 120-121, 129, 232), defense counsel failed to introduce these convictions at trial. (J.A. 41)

ex rel. Enoch v. Hartigan, *supra*, 768 F.2d at 164; *United States v. Davis*, *supra*, 639 F.2d at 245; *Fendler v. Goldsmith*, *supra*, 728 F.2d at 1190.

CONCLUSION

For the reasons stated, the judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1987

RAY TAYLOR, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether the Compulsory Process Clause prohibits a trial court from excluding a defense witness as the sanction for a violation of a discovery obligation.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of Argument	6
Argument:	
The Compulsory Process Clause does not prohibit a trial court in every case from precluding a defense witness from testifying as a sanction for a defense violation of a discovery requirement.....	8
A. The Compulsory Process Clause forbids only arbitrary barriers to a defendant's right to offer a defense to the charges against him.....	10
B. Reciprocal discovery statutes imposes a reasonable condition on the presentation of defense evidence	13
C. Precluding a defense witness from testifying because of a discovery violation is not always an unreasonable or disproportionate sanction....	15
D. Preclusion was a permissible sanction in this case because the defense willfully violated its discovery requirements	26
Conclusion	27

TABLE OF AUTHORITIES

Cases:

<i>Alicea v. Gagnon</i> , 675 F.2d 913 (7th Cir. 1982)	10, 23
<i>Blackmer v. United States</i> , 284 U.S. 421 (1932)	11
<i>Board of Directors of Rotary Int'l v. Rotary Club</i> , No. 86-421 (May 4, 1987)	7
<i>Braunskill v. Hilton</i> , 629 F. Supp. 511 (D.N.J. 1986), appeal pending, No. 86-5204 (3d. Cir.) ..	10
<i>Buchanan v. Kentucky</i> , No. 85-5348 (June 24, 1987)	9
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	9

IV

Cases—Continued:

Page

<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	9, 11, 12, 13, 16
<i>Commonwealth v. Edgerly</i> , 372 Mass. 337, 361 N.E.2d 1289 (1977)	9
<i>Crumpton v. United States</i> , 138 U.S. 361 (1891)...	15, 21
<i>Dutton v. Brown</i> , 812 F.2d 593 (10th Cir. 1987)...	21
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982)	14-15
<i>Escalera v. Coombe</i> , 652 F. Supp. 1316 (E.D.N.Y. 1987)	10, 16
<i>Fendler v. Goldsmith</i> , 728 F.2d 1181 (9th Cir. 1984)	10, 16
<i>Government of Virgin Islands v. Smith</i> , 615 F.2d 964 (3d Cir. 1980)	22
<i>Hartman v. State</i> , 176 Ind. App. 375, 376 N.E.2d 100 (1978)	9
<i>Hill v. California</i> , 401 U.S. 797 (1971)	9
<i>Holder v. United States</i> , 150 U.S. 91 (1893).....	21
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970)	17
<i>Isaacs v. United States</i> , 159 U.S. 487 (1895).....	15, 21
<i>Link v. Wabsh R.R.</i> , 370 U.S. 626 (1962)	25
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983).....	13
<i>Murray v. Carrier</i> , No. 84-1554 (June 26, 1986)...	7, 14, 25, 26
<i>National Hockey League v. Metropolitan Hockey Club, Inc.</i> , 427 U.S. 639 (1976)	20, 22
<i>People v. Curtis</i> , 141 Ill. App. 3d 827, 491 N.E.2d 134 (1986)	16
<i>People v. Foster</i> , 145 Ill. App. 3d 477, 495 N.E.2d 1141 (1986)	16
<i>People v. Rayford</i> , 43 Ill. App. 3d 283, 356 N.E.2d 1274 (1976)	16
<i>Pillsbury Co. v. Conboy</i> , 459 U.S. 248 (1983).....	21
<i>Rider v. Crouse</i> , 357 F.2d 317 (10th Cir. 1966)....	10
<i>Rock v. Arkansas</i> , No. 86-130 (June 22, 1987)	11, 12, 13
<i>Ronson v. Commissioner of Correction</i> , 604 F.2d 176 (2d Cir. 1979)	10, 16
<i>Rosen v. United States</i> , 245 U.S. 467 (1918).....	11
<i>Rowan v. Owens</i> , 752 F.2d 1186 (7th Cir. 1984)....	21
<i>Societe Internationale v. Rogers</i> , 357 U.S. 197 (1958)	23
<i>State v. Boucino</i> , 199 Conn. 207, 506 A.2d 125 (1986)	9, 15, 16, 17, 24

V

Cases—Continued:

Page

<i>State v. Dodd</i> , 101 Ariz. 234, 418 P.2d 571 (1966)	10, 17
<i>State v. Flohr</i> , 301 N.W.2d 367 (N.D. 1980).....	10, 17
<i>State v. Mai</i> , 294 Or. 269, 656 P.2d 315 (1982)....	10
<i>State v. Roberts</i> , 226 Kan. 740, 602 P.2d 1355 (1979)	9
<i>State v. Silva</i> , 118 R.I. 408, 374 A.2d 106 (1977)...	16
<i>State v. Smith</i> , 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975)	10
<i>State v. Smith</i> , 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985)	10, 16
<i>State ex rel. Simos v. Burke</i> , 41 Wis.2d 129, 163 N.W.2d 177 (1968)	10, 17
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)....	7, 18, 25
<i>Taliaferro v. State</i> , 295 Md. 376, 456 A.2d 29, cert. denied, 461 U.S. 948 (1983).....	10, 15, 16, 17, 19
<i>Ungar v. Sarafite</i> , 376 U.S. 575 (1964)	21
<i>United States v. Agurs</i> , 427 U.S. 97 (1976).....	25
<i>United States v. Alessio</i> , 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976)	22
<i>United States v. Balistrieri</i> , 779 F.2d 1191 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986)	24
<i>United States v. Barron</i> , 575 F.2d 752 (9th Cir. 1978)	8, 10, 17
<i>United States v. Bounos</i> , 693 F.2d 38 (7th Cir. 1982)	22
<i>United States v. Bryant</i> , 439 F.2d 642 (D.C. Cir. 1971)	24
<i>United States v. Caldwell</i> , 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976)...	22
<i>United States v. Davis</i> , 639 F.2d 239 (5th Cir. 1981)	10
<i>United States v. Echeverry</i> , 759 F.2d 1451 (9th Cir. 1985)	24
<i>United States v. Fitts</i> , 576 F.2d 837 (10th Cir. 1978)	8, 10
<i>United States v. Gibson</i> , 675 F.2d 825 (6th Cir.), cert. denied, 459 U.S. 972 (1982)	21
<i>United States v. Gilliss</i> , 645 F.2d 1269 (8th Cir. 1981)	15

VI

Cases—Continued:

Page

<i>United States v. Gotchis</i> , 803 F.2d 74 (2d Cir. 1986)	24
<i>United States v. Gottesman</i> , 724 F.2d 1517 (11th Cir. 1984)	22
<i>United States v. Graham</i> , 548 F.2d 1302 (8th Cir. 1977)	22
<i>United States v. Hunter</i> , 672 F.2d 815 (10th Cir. 1982)	22
<i>United States v. Karas</i> , 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981)	22
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	22
<i>United States v. Marion</i> , 404 U.S. 307 (1971)	22
<i>United States v. McClure</i> , 734 F.2d 484 (10th Cir. 1984)	21
<i>United States v. Moeckly</i> , 769 F.2d 453 (8th Cir. 1985), cert. denied, No. 85-1083 (May 5, 1986) ..	24
<i>United States v. Morrison</i> , 449 U.S. 361 (1981)	23
<i>United States v. Myers</i> , 550 F.2d 1036 (5th Cir. 1977)	16
<i>United States v. Nobles</i> , 422 U.S. 225 (1975)	7, 20
<i>United States v. Pennell</i> , 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)	22
<i>United States v. Pope</i> , 574 F.2d 320 (6th Cir.), cert. denied, 439 U.S. 868 (1978)	24
<i>United States v. Smith</i> , 524 F.2d 1288 (D.C. Cir. 1975)	10, 19, 24
<i>United States v. Tashjian</i> , 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981)	24
<i>United States v. Turkish</i> , 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981)	22
<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858 (1982)	15
<i>United States v. White</i> , 583 F.2d 899 (6th Cir. 1978)	8, 10, 16
<i>United States v. Whittington</i> , 783 F.2d 1210, on reh'g, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974 (Oct. 14, 1986)	22
<i>United States v. Wright</i> , 625 F.2d 1017 (1st Cir. 1980)	24

VII

Cases—Continued:

Page

<i>United States ex rel. Enoch v. Hartigan</i> , 768 F.2d 161 (7th Cir. 1985), cert. denied, No. 85-539 (Mar. 3, 1986)	10, 16
<i>United States ex rel. Robinson v. McGinnis</i> , 593 F. Supp. 175 (C.D. Ill. 1984), aff'd mem., 753 F.2d 1078 (7th Cir.), cert. denied, 471 U.S. 1116 (1985)	16
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	15
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973)	12, 13, 14, 19
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	11, 12, 13
<i>Webb v. Texas</i> , 409 U.S. 95 (1972)	11
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	13, 14, 15, 25

Constitution, statutes, and rules:

U.S. Const.:

Amend. VI (Compulsory Process Clause)	<i>passim</i>
Amend. XIV (Due Process Clause)	9, 11, 13

Jencks Act:

18 U.S.C. 3500	23
18 U.S.C. 3500(d)	23

Ill. Ann. Stat. ch. 110A (Smith-Hurd 1985):

para. 412	3
para. 413	3
para. 415(g)	16

Fed. R. Civ. P. 37

Fed. R. Crim. P.:

Rule 2	12
Rule 12.1 advisory committee notes (18 U.S.C. App. at 591)	19
Rule 12.1(d)	1, 19, 23
Rule 12.2	1
Rule 16(d)(2)	1
Rule 17(b)	15

Fed. R. Evid. 201

Ill. Sup. Ct. R.:

Rule 413(c)	3
Rule 413(d)	3
Rule 415(b)	3

Miscellaneous:

Page

Comment, <i>Alibi Notice Rules: The Preclusion Sanction as Procedural Default</i> , 51 U. Chi. L. Rev. 254 (1984)	17, 19
Epstein, <i>Advance Notice of Alibi</i> , 55 J. Crim. L. Criminology & Police Sci. 29 (1964)	14, 17, 19
H.R. 6799, 94th Cong., 1st Sess. (1975)	19
2 W. LaFave & J. Israel, <i>Criminal Procedure</i> (1984)	16
Millar, <i>The Modernization of Criminal Procedure</i> , 11 J. Crim. L. & Criminology 344 (1920)	14
Westen, <i>The Compulsory Process Clause</i> , 73 Mich. L. Rev. 73 (1974)	11
Williams, <i>Advance Notice of the Defense</i> , 1959 Crim. L. Rev. 548	14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-5963

RAY TAYLOR, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question in this case is whether the Compulsory Process Clause of the Sixth Amendment forbids the exclusion of a defense witness as a sanction for a deliberate violation of a discovery requirement. Several of the Federal Rules of Criminal Procedure impose reciprocal discovery obligations on the defense and authorize district courts to bar the testimony of defense witnesses as a sanction for violations of discovery requirements. See Fed. R. Crim. P. 12.1(d) (notice of alibi); Fed. R. Crim. P. 12.2 (notice of insanity defense); Fed. R. Crim. P. 16(d)(2) (general discovery obligations). The Court's resolution of the question presented in this case will apply to federal as well as state prosecutions, and will have a potentially significant effect on the administration of justice in the federal system.

STATEMENT

Following a jury trial in the Circuit Court of Cook County, Illinois, petitioner was convicted of attempted murder and was sentenced to ten years' imprisonment. The Appellate Court of Illinois affirmed his conviction. The Illinois Supreme Court denied him leave to appeal.

1. At approximately 8:30 p.m. on August 6, 1981, Jack Bridges, employed as an unarmed security guard at a liquor store, was standing in front of his sister's house talking to his sister, his brother, and some friends. While Bridges was standing outside the house, he saw Derrick Travis, a neighborhood youth, sitting on Bridges' car. Bridges told Travis to get off the car. When Travis swore at him, Bridges slapped Travis. R. 132-135, 234-235. Petitioner, who had been in a playground across the street, approached Bridges and told him he should not have slapped Travis. Joined by several companions, petitioner then argued for 20 minutes with Bridges. No weapons were displayed during the argument, which was broken up by a neighbor. R. 135-137, 235-236, 253. Petitioner and his friends returned to the playground, and Bridges drove away in his car (R. 137-138, 170-172).

Bridges returned to his sister's house an hour later. He hid his automobile at a nearby location after his brother Maurice Bethany said that petitioner and his companions had threatened to damage it. R. 139-141, 173-174, 238. After parking his car, Bridges heard petitioner and his companions—including Derrick Travis—ask where Bridges had gone. Bridges responded, "I'm over here. Come over here." Some members of petitioner's group then obtained sticks and pipes from an automobile. When they approached, Bridges told Travis that he wanted to apologize for slapping him. R. 142-144, 175-179, 240, 257-258. One of petitioner's companions then swung at Bridges. Bethany in turn swung at one of petitioner's friends, and petitioner then fired a gun at Bethany. The shot missed, and members of petitioner's group began beating Bridges with sticks

(R. 145, 180, 241, 259). Bridges ran and a group of six young men pursued him. When petitioner was approximately five feet from Bridges, he fired four shots from his gun, hitting Bridges in the back with the last shot. Bridges fell to the ground; petitioner pointed the gun at Bridges head and pulled the trigger, but the gun misfired. Bridges then heard petitioner say, "'He's dead.'" R. 146-147, 155, 157, 164, 181-184, 242-243, 260. When the police later arrived, Bridges identified petitioner as the man who had shot him (R. 148, 270).

Two sisters, Hatti and Regina Allgood, friends of petitioners, testified as the only defense witnesses. They said that they saw a group of men, including petitioner, approach Bridges with sticks and that Bridges was wounded when Bethany, his brother, fired shots into a crowd during the altercation (J.A. 36; R. 282-284, 292, 295-298, 305, 311-316). The sisters had never previously told that story to the police, even though they knew that the police were looking for petitioner the day after the incident (R. 299-300, 319-321).¹

2. Illinois statutes and rules permit the prosecution and defense in a criminal case to file a discovery motion requesting the other party to list before trial the names and last known addresses of the persons it intends to call as witnesses. See Ill. Ann. Stat. ch. 110A, paras. 412, 413 (Smith-Hurd 1985); Ill. Sup. Ct. R. 413(e) and (d), and 415(b). These provisions also authorize the trial court to impose sanctions for violations and require that the defendant give the State written notice of any defense he intends to assert. The statute provides that if either party fails to comply with a discovery request, the court may grant a continuance, exclude the affected evidence, or enter such other order as the court deems just under the circumstances. Under state law,

¹ Bridges was unarmed during the fight, and the evidence showed that neither he nor Bethany owned a gun (R. 152, 155, 162, 193, 196-197, 246). Both Bridges and Bethany denied that Bethany fired the shot that hit Bridges (R. 157, 193).

the appropriate sanction rests in the discretion of the trial court (Br. in Opp. 4-5).

Before trial, on July 14, 1983, the State filed a discovery request, asking the trial court to direct the defense to reveal the names and last known addresses of persons that petitioner intended to call as witnesses, and to give notice of his defense (J.A. 4-5). On November 10, 1983, petitioner filed an answer and subsequently filed an amended answer (J.A. 1). Petitioner stated that he would assert a non-affirmative defense. Originally, he listed the two sisters—Hattie and Regina Allgood—as well as two other witnesses. Subsequently, he added Derrick Travis as a witness (J.A. 8). The State also listed its witnesses (Pet. Br. 3).

Trial commenced on March 26, 1984. In petitioner's opening statement, his attorney claimed that while petitioner was involved in an altercation and a person was shot, petitioner did not have a gun, and the charge of attempted murder was "far-fetched" (R. 130-132). Defense counsel did not indicate that he would show that Bethany was responsible for Bridges' wound, nor did he suggest that anyone saw Bridges or any friend or relative of his with a gun.

At trial, the State called five witnesses: the victim Jack Bridges, his brother Maurice Bethany, his sister Jacqueline Jones, his friend Charles Trotter, and police officer Jon Davis. Following the testimony of Bridges and Bethany, defense counsel informed the court that he had learned during their testimony of additional witnesses who had seen the entire incident. Defense counsel then sought leave to amend the witness list that he previously submitted by adding the names of Alfred Wormley and Jan Berkhalter (J.A. 12). Defense counsel related that petitioner had told him about Wormley some time previously, but that counsel had not been able to locate Wormley. The court responded that the witness could have been listed with his address unknown. The court also questioned why the names had not been added earlier, stating that "this . . . is not the type of case

where the defendant would not know about witnesses. . . . The defendant is at the scene. We have a prior trial, apparently, in this matter. His buddies and cohorts are on trial in that case. . . . When you bring up these witnesses at the very last moment, there's always the allegation and the thought process that witnesses are being found that really weren't there . . ." (J.A. 13). The court then ordered that the witnesses be produced the following day to determine whether they would be allowed to testify (J.A. 14).

The next day, the defense produced Alfred Wormley, one of the two new witnesses. The prosecutor pointed out that defense counsel had waited until after the prosecution had put on its main witnesses before he sought to add the two new names to the witness list (J.A. 15). The court stated that defense counsel's failure to comply with the discovery rules was "inexcusable—and I have had, for the record, so many violations of discovery rules by the defense in the last few trials that it is unbelievable" (J.A. 16-17).

The court then instructed defense counsel to have Wormley, the witness who was present, testify out of the presence of the jury as an offer of proof (J.A. 17). Wormley testified that he was on the front porch at the home of Bridges' sister during the incident and saw Bridges hand Donna Kerr, his girlfriend at the time, two pistols wrapped in a blanket (J.A. 18-19, 23-24). Wormley claimed that he heard Bridges and his relatives say "they were after [petitioner] and the other people" (J.A. 19), and that he subsequently warned petitioner and his friends to watch out for weapons (J.A. 19, 24). He also said that he had recently moved back into the neighborhood, and that defense counsel had subpoenaed him by coming to his house a week before the trial (J.A. 21).

The State objected to Wormley's testimony on the ground that defense counsel had violated the discovery rules by lying when he claimed that he did not know Wormley's address. Defense counsel responded that the

omission of Wormley's name was an oversight on his part, and that he had found ten people who said they had seen the incident but that only two were willing to appear. He argued that Wormley should be allowed to testify although he did not see the shooting incident (J.A. 25-27).

The court refused to allow Wormley to testify because it found that there had been "a blat[ant] violation of the discovery rules, willful violation of the rules" (J.A. 28). The court explained that defense attorneys had violated discovery rules in recent cases and that "I am going to put a stop to it and this is one way to do so" (*ibid.*). The trial judge also said that he had "a great deal of doubt * * * as to the veracity" of the witness and that he did not "think that any attorney should violate any orders purposely for any defendant to get an edge for him" (*ibid.*).

3. Petitioner was convicted, and the Appellate Court of Illinois affirmed (J.A. 34-42). It ruled that the trial court did not abuse its discretion in refusing to allow Wormley to testify (*id.* at 39). The court pointed out that "[d]efense counsel had the opportunity to list the names of witnesses in his answer to discovery and, if necessary, indicate that their addresses were unknown" (*ibid.*). The Illinois Supreme Court denied leave to appeal (*id.* at 43).

SUMMARY OF ARGUMENT

The Compulsory Process Clause plays a limited role in regulating the rules of procedure and evidence in criminal trials. It prohibits only the application of "arbitrary" rules that needlessly burden a defendant's opportunity to present a defense. The issue in this case is whether the Compulsory Process Clause prohibits a court from ever barring a defense witness from testifying because of the violation of a reciprocal discovery obligation.

Reciprocal discovery requirements are a reasonable regulation of the trial process and are premised on the

belief that a system of mutual discovery will enhance the adversary process. The requirement that defense witnesses be disclosed to the prosecution before trial is a reasonable condition on the presentation of defense evidence, and it does not prevent a defendant from presenting his defense. The failure to comply with a discovery requirement may mislead the other party and may give the offending party an unfair advantage. A default is therefore properly subject to sanctions.

Barring a defense witness from testifying is a severe sanction, but it is a necessary one in some cases, because lesser penalties may not be effective at preventing perjury or encouraging compliance. Nor is barring a defense witness unconstitutional. The court approved a preclusion sanction in *United States v. Nobles*, 422 U.S. 225 (1975), over a Compulsory Process Clause objection, on the ground that preclusion was consistent with the dictates of the adversary process. Although preclusion is a permissible remedy in some instances, it is not appropriate in every case. The appropriateness of a preclusion order turns on a variety of factors, such as the culpability of the defense, the prejudice to the government, and the efficacy of lesser sanctions. Moreover, there are two additional safeguards to ensure that an innocent person is not convicted as a result of a discovery sanction. First, if a discovery violation is entirely the fault of defense counsel, a defendant can attempt to show that his conviction resulted from constitutionally ineffective assistance on the part of his counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984). Second, in an extraordinary case where preclusion would probably result in the conviction of a person who is actually innocent, preclusion should not be used. See *Murray v. Carrier*, No. 84-1554 (June 26, 1986), slip op. 15.

ARGUMENT

THE COMPULSORY PROCESS CLAUSE DOES NOT PROHIBIT A TRIAL COURT IN EVERY CASE FROM PRECLUDING A DEFENSE WITNESS FROM TESTIFYING AS A SANCTION FOR A DEFENSE VIOLATION OF A DISCOVERY REQUIREMENT

The trial court prohibited Alfred Wormley from testifying because of petitioner's willful violation of a discovery requirement. Petitioner contends that the trial court's ruling violated the Compulsory Process Clause of the Sixth Amendment. That Clause, he claims, prohibits a trial court from ever barring a defense witness from testifying as a penalty for a discovery violation.² Peti-

² In our view, that claim is not properly before the Court, for several reasons.

First, petitioner did not raise a Compulsory Process Clause challenge at trial. He did not invoke that Clause (or any other provision of the Constitution) during the midtrial hearing (R. 203-231), and his post-trial motion for a new trial merely alleged that "[t]he Court erred by not letting a witness for defendant testify before the Jury" (R. 412).

Second, petitioner did not preserve his claim on appeal. On appeal to the Illinois appellate court, petitioner stated that the issue was "[w]hether the exclusion of a material defense witness as a sanction for a discovery violation was an abuse of discretion and a denial of due process of law" (Appellant's Br. 7; see *id.* at 28-32); he did not mention either the Compulsory Process Clause or the Sixth Amendment. A claim that a trial court has abused its discretion is not equivalent to a claim that the Compulsory Process Clause has been violated. See *United States v. White*, 583 F.2d 899, 901 n.3 (6th Cir. 1978); *United States v. Pitts*, 576 F.2d 837, 839 (10th Cir. 1978); *United States v. Barron*, 575 F.2d 732, 737 & n.3 (9th Cir. 1978). Moreover, the Illinois appellate court did not view petitioner's claim as resting on the Sixth Amendment; it believed that petitioner's claim was "that the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for a violation of the discovery rules" (J.A. 38). Not until petitioner submitted a rehearing petition to that court did he refer to the Compulsory Process Clause, and his rehearing petition (at 1) made only the following oblique reference: "[f]ew rights are more fundamental than that of an accused to

tioner argues that barring a defense witness from taking the stand will inevitably distort the factfinding process and may lead to an unjust conviction; that there are other, less drastic penalties available to a trial judge to enforce a defendant's discovery obligations; and that preclusion unfairly punishes an accused for his attorney's wrong. Preclusion, he claims, is therefore an unduly harsh and unconstitutional penalty.

In our view, petitioner has misread this Court's Compulsory Process Clause decisions and has overstated the capacity of other sanctions to police the discovery process. The Compulsory Process Clause does not forbid the government from making timely compliance with a reciprocal discovery rule a proper condition for the presentation of defense evidence, and it does not forbid a trial court from ever enforcing defense compliance by excluding material evidence. More specifically, preclusion is not an impermissible sanction for a willful violation of a discovery rule, such as the one that occurred in this case. Accordingly, petitioner was not unconstitutionally denied the right to present a defense because the trial court did not allow Wormley to take the stand.³

present witnesses in his own defense.' *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); U.S. Const., Amends. VI, XIV." Even if this passing reference were sufficient to have squarely presented the issue to the state courts (but see *Board of Directors of Rotary Int'l v. Rotary Club*, No. 86-421 (May 4, 1987), slip op. 11), the Illinois court of appeal denied the petition for rehearing without opinion. In these circumstances, petitioner has failed to preserve his Compulsory Process claim. *Rotary Club*, slip op. 11-12; *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); see also *Buchanan v. Kentucky*, No. 85-5348 (June 24, 1987), slip op. 1 n.1.

³ State courts have ruled that a preclusion sanction is not a per se violation of the Sixth Amendment. See, e.g., *State v. Boucino*, 199 Conn. 207, 506 A.2d 125, 130 (1986); *Hartman v. State*, 176 Ind. App. 375, 383-384, 376 N.E.2d 100, 105 (1978); *State v. Roberts*, 226 Kan. 740, 744, 602 P.2d 1355, 1358 (1979); *Commonwealth v. Edgerly*, 372 Mass. 337, 343, 361 N.E.2d 1289, 1292-1293 (1977);

A. The Compulsory Process Clause Forbids Only Arbitrary Barriers To A Defendant's Right To Offer A Defense To The Charges Against Him

Petitioner contends (Br. 15) that the Compulsory Process Clause guarantees the defendant the right to present a defense at trial. That right, he claims, is violated by excluding a defense witness, since less drastic sanc-

Taliaferro v. State, 295 Md. 376, 389, 456 A.2d 29, 36, cert. denied, 461 U.S. 948 (1983); *State v. Smith*, 88 N.M. 541, 543, 543 P.2d 834, 836 (Ct. App. 1975); *State v. Flohr*, 301 N.W.2d 367, 371-372 (N.D. 1980); *State v. Smith*, 17 Ohio St. 3d 98, 104, 477 N.E.2d 1128, 1133 (1985); *State v. Mai*, 294 Or. 269, 277-278, 656 P.2d 315, 320-321 (1982); *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 139-140, 163 N.W.2d 177, 182 (1968); cf. *State v. Dodd*, 101 Ariz. 234, 237, 418 P.2d 571, 574 (1966) (same conclusion under parallel state constitutional provision).

The federal courts have not developed a uniform position on this subject. Several federal courts have found that preclusion was not an abuse of discretion in a particular case, but have not specifically addressed the constitutional challenge to the remedy. *United States v. White*, 583 F.2d 899, 901-902 (6th Cir. 1978); *United States v. Fitts*, 576 F.2d 837, 839 (10th Cir. 1978); *United States v. Barron*, 575 F.2d 752, 757-758 (9th Cir. 1978); see also *United States v. Smith*, 524 F.2d 1288, 1291 (D.C. Cir. 1975) (preclusion harmless). The Tenth Circuit has expressly upheld the constitutionality of a state statute that imposes a sanction prohibiting the defendant from testifying. *Rider v. Crouse*, 357 F.2d 317 (1966). Several district courts have also expressly rejected a per se rule. *Escalera v. Coombe*, 652 F. Supp. 1316, 1323 (E.D.N.Y. 1987); *Braunskill v. Hilton*, 629 F. Supp. 511, 522-523 (D.N.J. 1986), appeal pending, No. 86-5204 (3d Cir.). The Second and Seventh Circuits have followed a balancing approach in determining whether preclusion is permissible, *Ronson v. Commissioner of Correction*, 604 F.2d 176 (2d Cir. 1979); *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir. 1985), cert. denied, No. 85-539 (Mar. 3, 1986), although the Seventh Circuit has ruled that the defendant, at least, cannot be precluded from testifying because of a discovery violation, *Alicea v. Gagnon*, 675 F.2d 913 (1982). The Ninth Circuit has declined to endorse either a per se rule or a balancing approach. *Fendler v. Goldsmith*, 728 F.2d 1181 (1984). By contrast, the Fifth Circuit has ruled that preclusion is never permissible for any witness. *United States v. Davis*, 639 F.2d 239 (1981).

tions are available. The premise of that argument, however, is overbroad. The Compulsory Process Clause does ensure the accused the right to offer a defense at trial, but it does so primarily, as its text indicates, by enabling him to compel witnesses to be present. U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."); see *Blackmer v. United States*, 284 U.S. 421, 442 (1932) (referring to the right to subpoena defense witnesses).⁴ A subsidiary feature of the Clause is that it prohibits the application of arbitrary procedural or evidentiary rules preventing a defendant from offering relevant evidence at trial to support his defense. *Rock v. Arkansas*, No. 86-130 (June 22, 1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); see also *Webb v. Texas*, 409 U.S. 95 (1972).⁵ But the role that the Clause plays in this regard is considerably more modest than petitioner suggests.

The Court's decisions in *Washington*, *Chambers*, and *Rock* did not significantly curtail the freedom of legislatures and courts to devise rules governing criminal trials. Crucial to the Court's decision in each case was the determination that the particular restriction at issue was an

⁴ The brief history surrounding the adoption of the Clause is set forth in Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 73, 95-101 (1974). This Court did not rely on the Clause to strike down a procedural or evidentiary restriction on a defendant's opportunity to present evidence until the 1967 decision in *Washington v. Texas*, *supra*, even though the Court had addressed such issues well before then. *E.g.*, *Rosen v. United States*, 245 U.S. 467 (1918) (abandoning the federal common law rule that a defendant is incompetent to testify at his own trial).

⁵ Although the Court's ruling in *Chambers v. Mississippi* was based on the Due Process Clause, rather than the Compulsory Process Clause (410 U.S. at 302-303), the Court has treated the decision there as if it had rested on the latter. See *Rock v. Arkansas*, slip op. 10-11.

"arbitrary" limitation on the defendant's opportunity to present relevant evidence. *Washington v. Texas* held invalid an evidentiary rule prohibiting the defendant (but not the prosecution) from introducing an accomplice's testimony, on the ground that the rule "arbitrarily" denied the defendant the right to present relevant evidence. 388 U.S. at 23. Similarly, *Chambers v. Mississippi* found invalid the combined application of a voucher rule, under which a defendant was bound by the direct testimony of any defense witness, and the state's hearsay rule, which "mechanistically" excluded testimony that bore assurances of trustworthiness and was corroborated by other evidence. 410 U.S. at 296, 302. Finally, *Rock v. Arkansas* ruled that a state may not adopt a per se rule prohibiting a defendant from offering his own hypnotically refreshed testimony. The Court explained that, absent clear proof that all hypnotically refreshed testimony is too unreliable to allow before the jury, a per se rule "arbitrarily" restricts a defendant's opportunity to offer potentially exculpatory testimony that could be proved reliable in his own case. Slip op. 17. In each case, therefore, the rule at issue arbitrarily denied a defendant the opportunity to offer exculpatory evidence, and the Court's ruling was limited to restrictions of that type. *Rock v. Arkansas*, slip op. 11; see also *Wardius v. Oregon*, 412 U.S. 470, 474 n.6 (1973) ("[t]his Court has * * * been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial," citing *Washington v. Texas*, *supra*).

That characterization will not apply to most procedural and evidentiary rules governing the trial process, because most such rules further the same purpose as the Compulsory Process Clause: *i.e.*, they enable "the jury [to] decide where the truth lies" (*Washington v. Texas*, 388 U.S. at 19). See Fed. R. Crim. P. 2; Fed. R. Evid. 201. Reasonable limitations on the presentation

of defense evidence—restrictions that enable the trier of fact rationally to decide the charges against a defendant without needlessly burdening his opportunity to establish his innocence—therefore are no concern of the Sixth Amendment. See *Rock v. Arkansas*, slip op. 11 ("restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve").⁶ Put another way, the Compulsory Process Clause does not guarantee the defendant an absolute right to call or question a witness irrespective of the constraints established by fair and rational rules of criminal procedure and evidence.

B. Reciprocal Discovery Statutes Impose A Reasonable Condition On The Presentation Of Defense Evidence

Unlike the procedural and evidentiary rules considered in *Washington*, *Chambers*, and *Rock*, reciprocal discovery rules are reasonable conditions on the presentation of defense evidence. Reciprocal discovery rules, like the Illinois statute at issue here, are based on the principle that a system of complementary disclosure will reduce the possibility of surprise at trial and enhance the fairness and accuracy of the verdict by enabling each party to investigate the other's proof. See, *e.g.*, *Wardius v. Oregon*, 412 U.S. at 473-474; *Williams v. Florida*, 399 U.S. 78, 81 (1970). Reciprocal discovery rules are also constitutional despite their requirement that the accused disclose his hand before trial. In *Williams v. Florida*, the Court ruled that a statute requiring the defendant to notify the prosecution of his intent to raise an alibi defense and to identify his supporting witnesses does not violate the Due Process Clause. The Court explained that, "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. * * * The

⁶ *Rock v. Arkansas*, slip op. 11-12 & n.11; *Chambers v. Mississippi*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. at 23 n.21; see also *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983).

adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." 399 U.S. at 81-82 (footnote omitted). *Wardius v. Oregon*, which also involved a notice-of-alibi statute, reaffirmed *Williams*, stating that "nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery" (412 U.S. at 474), as long as discovery is a two-way street (*id.* at 474-476). In fact, the Court described reciprocal discovery rules as "a salutary development which * * * enhances the fairness of the adversary system" (*id.* at 474).

Williams and *Wardius* involved notice-of-alibi statutes, but the reasoning there is equally applicable to general reciprocal discovery statutes. A statute like the one involved here, which requires each party to provide the other before trial with a list of witnesses, is designed to reduce surprise, discourage perjury, enhance the accuracy of the verdict, and avoid the delay resulting from the need during trial to grant one party a continuance.⁷ Moreover, reciprocal discovery rules share a family resemblance to contemporaneous-objection requirements: both types of rules impose procedural restrictions on the manner in which defense claims are raised. These restrictions are designed to ensure the fair and orderly consideration of those claims by the court or the trier of fact, or, put conversely, to prevent "sandbagging" by the defense. Compare *Wardius v. Oregon*, 412 U.S. at 473-474, and *Williams v. Florida*, 399 U.S. at 81-82, with *Murray v. Carrier*, No. 84-1554 (June 26, 1986); *Engle*

⁷ Compare *Wardius v. Oregon*, 412 U.S. at 474; *Williams v. Florida*, 399 U.S. at 81-82; Epstein, *Advance Notice of Alibi*, 55 J. Crim. L. Criminology & Police Sci. 29, 31-32 (1964); Millar, *The Modernization of Criminal Procedure*, 11 J. Crim. L. & Criminology 344, 350 (1920); *Williams, Advance Notice of the Defense*, 1959 Crim. L. Rev. 548, 549. In some states, the parties may depose the witnesses and thereby obtain a preview of their expected trial testimony. See *Williams v. Florida*, 399 U.S. at 83.

v. Isaac, 456 U.S. 107 (1982); and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Requiring the defendant to disclose his witnesses before trial is not onerous; all that a defendant must do is to identify his witnesses at an earlier rather than a later phase of the proceedings. Cf. *Williams v. Florida*, 399 U.S. at 83-86. The Illinois procedure is not significantly more burdensome than the ordinary practice of issuing a subpoena on a witness before the trial commences.⁸ A state therefore may validly conclude that a general reciprocal discovery statute is a reasonable condition on the presentation of defense evidence and enables the criminal trial process better to adjudicate the factual question of the defendant's guilt or innocence. See, e.g., *State v. Boucino*, 199 Conn. 207, 506 A.2d 125, 130 (1986); *Taliaferro v. State*, 295 Md. 376, 389, 456 A.2d 29, 36, cert. denied, 461 U.S. 948 (1983) (collecting cases).

C. Precluding A Defense Witness From Testifying Because Of A Discovery Violation Is Not Always An Unreasonable Or Disproportionate Sanction

Petitioner argues (Br. 15-20) that a preclusion sanction is unduly harsh because other, less drastic penalties are available and equally effective, such as stiff disciplinary actions against an offending lawyer.

To be sure, preclusion is a harsh remedy, and it would be unreasonable one in many cases. "Few rights are

⁸ Indeed, requiring a defendant to list a witness is far less burdensome than the showing that a defendant must make to obtain the testimony of witnesses in various circumstances. For example, an indigent defendant must make a satisfactory showing that the witness is necessary for his defense before he can compel the government to shoulder the cost of subpoenaing the witness. Fed. R. Crim. P. 17(b); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 n.7 (1982); see also *Isaacs v. United States*, 159 U.S. 487, 489 (1895); *Crompton v. United States*, 138 U.S. 361, 364-365 (1891). Courts have said that compulsory process under this rule is not an absolute right, but is committed to the sound discretion of the court. See *United States v. Gilliss*, 645 F.2d 1269, 1279 (8th Cir. 1981).

more fundamental than that of an accused to present witnesses in his own defense" (*Chambers v. Mississippi*, 410 U.S. at 302), and the preclusion sanction directly affects that right. Recognizing the importance of the interests at stake, most state and federal courts have applied a balancing test to determine whether preclusion is appropriate in a particular case.⁹ Petitioner's argument therefore might have merit if a statute required a witness to be barred from testifying in every case. But that is not the case here, because the Illinois statute only *authorizes* preclusion, and does not *require* it.¹⁰ Accord-

⁹ See, e.g., *United States ex rel. Enoch v. Hartigan*, 768 F.2d at 163; *Fendler v. Goldsmith*, 728 F.2d at 1187-1189; *Ronson v. Commissioner of Correction*, 604 F.2d at 179; *United States v. White*, 583 F.2d at 902; *Escalera v. Coombe*, 652 F. Supp. at 1323-1324; *United States ex rel. Robinson v. McGinnis*, 593 F. Supp. 175, 180 & n.3 (C.D. Ill. 1984), *aff'd mem.*, 753 F.2d 1078 (7th Cir.) (Table), *cert. denied*, 471 U.S. 1116 (1985); *State v. Boucino*, 506 A.2d at 130; *Taliaferro v. State*, 295 Md. at 389, 456 A.2d at 36; *State v. Smith*, 17 Ohio St. 3d at 105, 477 N.E.2d at 1134; *State v. Silva*, 118 R.I. 411-412, 374 A.2d 106, 109 (1977); 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.4, at 527-529 (1984); cf. *United States v. Myers*, 550 F.2d 1036, 1043 (5th Cir. 1977) (government's failure to satisfy discovery requirements). This is the approach followed by state courts in Illinois. See, e.g., *People v. Foster*, 145 Ill. App. 3d 477, 495 N.E.2d 1141 (1986); *People v. Curtis*, 141 Ill. App. 3d 827, 491 N.E.2d 134 (1986); *People v. Rayford*, 43 Ill. App. 3d 283, 287, 356 N.E.2d 1274, 1277 (1976).

¹⁰ The Illinois statute contains alternatives. It provides that if a party fails to comply with a discovery order, "the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." It also provides that "[w]ilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court." Ill. Ann. Stat. ch. 110A, para. 415(g) (Smith-Hurd 1985). In this statute, Illinois has adopted a variety of possible sanctions calculated to induce compliance with its discovery rules and to provide a remedy suitable to every degree of delinquency.

ingly, the question is whether preclusion is ever a permissible sanction for a defense violation of a discovery requirement, regardless of the circumstances. We believe that in some cases preclusion will be the only effective remedy for a discovery violation. While preclusion is a severe remedy and should not always be imposed, it is sometimes a necessary penalty and should be a permissible one.¹¹

1. In some cases preclusion is necessary to ensure that a discovery sanction is not toothless.¹² For example, granting the prosecution a continuance to question or investigate a newly-identified witness is no sanction at all, since the prosecution always could have sought a continuance absent a reciprocal discovery requirement if unexpected evidence had surfaced at trial. Limiting the prosecution to seeking a continuance thus would have no deterrent effect on defense violations of discovery obligations. Moreover, forcing the prosecution to obtain a continuance can often work to the advantage of the defense by disrupting the trial. Denying a defendant additional discovery may also be no penalty at all, because the violation may not come to light until the prosecution has already introduced or disclosed most or all of its evidence, as occurred in this case. Finally, the risk of being held in contempt will be no threat to a defendant facing a lengthy period of incarceration on the principal charge

¹¹ This case does not involve excusable neglect or the presentation of a witness who first became known during trial. It also does not present the issue whether the preclusion sanction may be applied for a violation that is unintentional but nonetheless results in prejudice to the prosecution.

¹² See, e.g., *United States v. Barron*, 575 F.2d at 757; *State v. Dodd*, 101 Ariz. at 237, 418 P.2d at 574; *State v. Boucino*, 506 A.2d at 130; *Taliaferro v. State*, 295 Md. at 389, 456 A.2d at 36; *State v. Flohr*, 301 N.W.2d at 372; *State ex rel. Simos v. Burke*, 41 Wis. 2d at 139-140, 163 N.W.2d at 182; Epstein, *supra*, 55 J. Crim. L. Criminology & Police Sci. at 36; Comment, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Chi. L. Rev. 254, 276-277 (1984).

against him. See *Illinois v. Allen*, 397 U.S. 337, 345 (1970).

Petitioner favors imposing a penalty on defense counsel, but there is no guarantee that that approach will always be successful. A lawyer looking for a victory in an important case may consider the possibility of disciplinary action to be remote and may take the risk of receiving a small fine for contempt. Moreover, contempt will not suffice—and usually will not even be appropriate—where it is the defendant's fault that a witness's identity was deliberately withheld. The threat of contempt against defense counsel will do little or nothing to discourage a defendant from identifying a known witness only after trial has begun, and in that event the prospect of a contempt sanction may create a conflict of interest between the attorney and his client. Even if referring defense counsel to the disciplinary committee of the local bar deters some attorneys from violating discovery rules, that remedy will not ensure that a particular witness testifies truthfully. Where the belated identification of a witness bears the earmarks of a defense fabricated to meet the prosecution's evidence—as the trial judge found to be the case here—a contempt sanction does little or nothing to ensure the fairness of a particular proceeding or the accuracy of a particular verdict.

Nor is it true that preclusion necessarily punishes the defendant for his attorney's error. Normally, the requirement that a defendant provide a witness list is triggered by a request from the prosecution. At that point, defense counsel will confer with his client about the list. Defense counsel will ordinarily rely on the accused to identify relevant witnesses. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984). If the defendant is not in custody, counsel will rely on the defendant to help locate them. Defense counsel will also often explain the importance of listing all witnesses in order to comply with the statute or rule. The blame for failing to list a witness may therefore often be laid at the defendant's doorstep.

The importance of having preclusion as an available sanction is evidenced by the fact that most states and the federal government authorize preclusion for a violation of alibi disclosure requirements. *E.g.*, Fed. R. Crim. P. 12.1(d).¹³ Indeed, in many states preclusion is the sole remedy for alibi disclosure violations.¹⁴ The legisla-

¹³ See Rule 12.1 advisory committee notes, 18 U.S.C. App. at 591; *Taliaferro v. State*, 295 Md. at 387, 456 A.2d at 35; Epstein, *supra*, 55 J. Crim. L. Criminology & Police Sci. at 35; Comment, *supra*, 51 U. Chi. L. Rev. at 260, 281-285.

The advisory committee notes on Rule 12.1 stated (18 U.S.C. App. at 591): "The court [in *Wardius v. Oregon*, 412 U.S. 470 (1973)] said that it did not consider the question of the 'validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule.' * * * Rule 12.1(e) provides that the court may exclude the testimony of any witness whose name has not been disclosed pursuant to the requirements of the rule. The defendant may, however, testify himself. Prohibiting from testifying a witness whose name was not disclosed is a common provision in state statutes. See Epstein, [Advance Notice of Alibi, 55 J. Crim. L. Criminology & Police Sci. 29, 35 (1964)]. It is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance. See Epstein, *supra*, at 36. The use of the term 'may' is intended to make clear that the judge may allow the alibi witness to testify if, under the particular circumstances, there is cause shown for the failure to conform to the requirements of the rules. This is further emphasized by subdivision (f) which provides for exceptions whenever 'good cause' is shown for the exception."

This rule as finally formulated was identical to the original version submitted by this Court to Congress. The House bill on Rule 12.1(d) as submitted to the House Committee would have made exclusion of alibi witnesses the mandatory sanction if the defense failed to comply with the disclosure requirements. H.R. 6799, 94th Cong., 1st Sess. (1975); see *United States v. Smith*, 524 F.2d at 1290 n.5.

¹⁴ *Taliaferro v. State*, 295 Md. at 387, 456 A.2d at 35-36; Comment, *supra*, 51 U. Chi. L. Rev. at 260. In 1984, notice-of-alibi rules or statutes were in effect in 41 states and the District of Columbia. Comment, *supra*, 51 U. Chi. L. Rev. at 259-260, 281-285. Most jurisdictions have an express provision for the exclusion of alibi witness. *Taliaferro v. State*, *supra*.

tive judgment that preclusion is sometimes necessary is also reasonable. As this Court explained in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (upholding dismissal of the plaintiff's complaint under Fed. R. Civ. P. 37 for discovery violations made in bad faith), "here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

This Court has also recognized that a preclusion remedy is not invariably inconsistent with the Sixth Amendment. In *United States v. Nobles*, 422 U.S. 225 (1975), the Court upheld a trial court's order excluding a defense investigator's testimony after defense counsel had refused to disclose his report to the government. The Court pointed out that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." 422 U.S. at 241. Moreover, the Court was unwilling to render hollow the requirement that the defendant disclose the investigator's report to the government by allowing his violation to go unremedied. "Deciding, as we do, that it was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment" (*ibid.*).

In *Nobles*, nondisclosure would have hampered the prosecutor's ability to cross-examine a defense witness. A defendant's failure to disclose the names of his witnesses before trial may have a similar effect, because depriving the government of the opportunity to investigate the witnesses will often impair the effectiveness of

the prosecution's cross-examination. In both cases, the existence of a preclusion sanction does not interfere with the defendant's right to present a defense. The defendant has an unimpeded right to offer evidence, as long as he complies with reasonable discovery rules applicable to that evidence.

The fact that relevant defense evidence may be excluded is neither unusual nor fundamentally unfair. The Court has recognized that defense evidence can be excluded or lost in a variety of other settings without violating the Constitution. For example, in the case of a violation of a sequestration order by a defense witness, the court has the discretion to remedy the violation by precluding the witness from testifying. See *Holder v. United States*, 150 U.S. 91 (1893); see also *Rowan v. Owens*, 752 F.2d 1186, 1191 (7th Cir. 1984); *United States v. McClure*, 734 F.2d 484, 495 (10th Cir. 1984); *United States v. Gibson*, 675 F.2d 825, 835-836 (6th Cir.), cert. denied, 459 U.S. 972 (1982). Compare *Dutton v. Brown*, 812 F.2d 593, 599-602 (10th Cir. 1987) (en banc) (exclusion at the sentencing stage of a capital case found improper). Similarly, the denial of a defense request for a continuance may prevent a defendant from presenting evidence, but not every denial of a continuance "violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); see also *Isaacs v. United States*, 159 U.S. 487, 489 (1895); *Crumpton v. United States*, 138 U.S. 361, 364-365 (1891). Another such example is provided by the case of potential defense witnesses who are excused from testifying because of their assertion of the privilege against compulsory self-incrimination. Except in unusual cases, the courts have held that a defendant has no Sixth Amendment right to demand that the witness be given immunity so that he can testify. Cf. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261-262 (1983).¹⁵ Finally, preindictment delay by the

¹⁵ The courts of appeals have overwhelmingly ruled that judges may not immunize prospective defense witnesses without a request

prosecution may result in the prejudicial loss of evidence to the defense, but the Court has held that no constitutional violation is established unless the government has manipulated the delay to gain a tactical advantage at trial. *United States v. Lovasco*, 431 U.S. 783, 795 & n.17 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971).

In sum, although preclusion is a severe remedy, the countervailing considerations are insufficient to justify an absolute ban on its use. The other remedies that petitioner proposes may not discourage violations of the discovery rule, and an absolute ban on preclusion could make a nullity out of reciprocal discovery. The policy question whether preclusion should be an available penalty should be left to Congress and the state legislatures, who should be free to conclude for criminal cases, as this Court determined in the *National Hockey League* case for civil litigation, that a severe remedy is sometimes necessary to enforce a defendant's discovery obligations.

2. A balancing test is appropriate in a particular case to determine what penalty, if any, should be imposed for a violation of a discovery rule. A flagrant violation, for

from the prosecution. See, e.g., *United States v. Whittington*, 783 F.2d 1210, 1219-1220, on reh'g, 786 F.2d 644 (5th Cir. 1986), cert. denied, No. 85-1974 (Oct. 14, 1986); *United States v. Pennell*, 737 F.2d 521, 526-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States v. Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984); *United States v. Bounos*, 693 F.2d 38, 39 (7th Cir. 1982); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States v. Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States v. Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States v. Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States v. Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976). But cf. *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980) (holding that a district court may immunize a defense witness when he possesses essential exculpatory information that is unavailable from other sources).

example, differs from a technical or negligent one, and should be treated differently. The trial court should therefore consider a variety of factors in deciding upon the proper sanction, such as the nature of the violation (i.e., whether it was technical or in bad faith); the timing of the disclosure (i.e., whether the disclosure was untimely but in advance of trial, or whether it occurred well into trial); the diligence shown by the defense to uncover the witness before trial; the strength of each party's case; the identity of the person to be barred;¹⁶ the prejudice suffered by the prosecution; and the extent to which alternative penalties can remedy the violation. After considering these factors, the court should weigh the need for exclusion against the defendant's opportunity to present a defense and should attempt to tailor the remedy to the wrong.¹⁷ If the court's assessment of the competing interests is seriously flawed, the use of preclusion as a remedy can result in a constitutional violation.

That approach is consistent with the decisions of the federal courts applying the Jencks Act, 18 U.S.C. 3500. The sanctions provision of the Jencks Act, 18 U.S.C. 3500(d), authorizes the courts to strike the testimony of a government witness if the government fails to provide the accused with a statement made by the witness relating to the subject matter of his testimony. The courts of appeals have uniformly concluded that, absent a delib-

¹⁶ Preclusion would ordinarily be deemed unreasonable if it were the defendant who was barred from testifying, since the prosecution will be prepared to refute the defendant's version of the events before trial commences. See *Alicea v. Gagnon*, 675 F.2d at 923-924. The Federal Rules of Criminal Procedure provide that the defendant may not be prohibited from testifying because of a violation of an alibi disclosure requirement. Fed. R. Crim. P. 12.1(d).

¹⁷ Compare *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) (interpreting Fed. R. Civ. P. 37); cf. *United States v. Morrison*, 449 U.S. 361, 365 (1981) ("[o]ur approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant * * * a fair trial").

erate refusal by the government to disclose a witness's statement, a trial court is not required to strike the testimony of a witness whose statement has not been turned over to the defense. Rather, trial courts have the discretion to formulate an appropriate remedy and should consider both the government's culpability and the extent to which the defendant has been prejudiced.¹⁸ Thus, just as the federal courts have been reluctant to preclude a government witness because of a Jencks Act violation, a lesser remedy than preclusion will often be appropriate as a sanction for a defendant's discovery violation.¹⁹

There are two important practical considerations to guide the foregoing general principles. First, in selecting an appropriate remedy, a trial court should be entitled to consider whether a newly-identified witness is credible. The inquiry in this context is similar to the determination whether a defendant is entitled to a new trial on the basis of newly-discovered evidence, where a court has the authority to assess the credibility of the new evidence. See, e.g., *United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980). Moreover, given the ease of fabricating

¹⁸ See, e.g., *United States v. Gotchis*, 803 F.2d 74, 78 (2d Cir. 1986); *United States v. Balistreri*, 779 F.2d 1191, 1220-1221 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986); *United States v. Moeckly*, 769 F.2d 453, 464 (8th Cir. 1985), cert. denied, No. 85-1083 (May 5, 1986); *United States v. Echeverry*, 759 F.2d 1451, 1456 (9th Cir. 1985); *United States v. Tashjian*, 660 F.2d 829, 839 (1st Cir.), cert. denied, 454 U.S. 1102 (1981); *United States v. Pope*, 574 F.2d 320, 322-327 (6th Cir.), cert. denied, 439 U.S. 868 (1978); *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971).

¹⁹ At the same time, a state may place the burden on the defaulting party to show good cause why exclusion is not warranted under the circumstances. The offending party may be given the burden of showing why the sanction is excessive and suggesting to the court that alternative sanctions are more appropriate. And where there is no suggestion that alternative sanctions be employed, a trial court may properly exclude a witness without explaining why it did not use such penalties. *State v. Boucino*, 506 A.2d at 131; see *United States v. Smith*, 524 F.2d at 1289-1290.

an alibi defense (*Williams v. Florida*, 399 U.S. at 81), a court should be entitled to determine whether a newly-disclosed alibi witness is likely to offer perjured testimony. In some cases, this consideration is likely to help the defendant: if a trial court determines that the defense meets the standard for obtaining a new trial on the basis of newly-discovered evidence (see *United States v. Agurs*, 427 U.S. 97, 111 (1976)), that conclusion militates in favor of permitting the accused to introduce the witness.

Second, a trial court need not interrupt a trial to hold an evidentiary proceeding to determine whether the defendant, his lawyer, or both are responsible for the violation. Rather, the court is entitled to presume that defense counsel was competent (see *Strickland v. Washington*, 466 U.S. at 690) and discussed the defense discovery requirements with his client. Thus, a discovery violation ordinarily can be charged to the accused. See *Murray v. Carrier*, slip op. 7.²⁰ At the same time, there are additional safeguards to ensure that an innocent person is not convicted. A defendant can always attempt to show that the violation was attributable to his attorney's carelessness, for instance, and that counsel was constitutionally ineffective. See *Strickland v. Washington*, *supra*. Moreover, a witness should not be barred from testifying

²⁰ As the Court held in *Murray v. Carrier*, slip op. 7: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standards established in *Strickland v. Washington*, *supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." See also *Link v. Wabash R.R.*, 370 U.S. 626, 633-634 (1962) (citation omitted) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'").

if his exclusion would result in a miscarriage of justice. Accordingly, in an extraordinary case, where the court concludes that preclusion would probably result in the conviction of a person who is actually innocent, a preclusion sanction should not be used, even if the other criteria would support the exclusion of the defense witness. In such a case the use of the preclusion sanction would be an error of constitutional dimension. See *Murray v. Carrier*, slip op. 15.

D. Preclusion Was A Permissible Sanction In This Case Because The Defense Willfully Violated Its Discovery Requirements

In this case, it is clear that Wormley was deliberately excluded from the witness list, and the trial court so found (J.A. 28). The trial court determined that "this is a blat[ant] violation of the discovery rules, [a] willful violation of the rules," done for the "purpos[e] [of] * * * get[ting] an edge for [petitioner]" (*ibid.*). The discovery violation was aggravated when defense counsel did not mention Wormley or his expected testimony in his opening statement, and when he postponed disclosure of Wormley's name until the State had already presented its two most important witnesses. Those facts alone would be sufficient to sustain the trial court's preclusion ruling, because they manifest a clear design on the part of defense counsel to flout the discovery rules in an effort to gain a tactical advantage for petitioner. But there is more.

Wormley was not an eyewitness to the fracas or the shooting. Although he stated that he saw Bridges hand a blanket containing two guns to his then-girl friend, Wormley's testimony was not directly exculpatory, and in any event the trial court expressed grave doubts about the credibility of Wormley's story (J.A. 28). This case was therefore not one in which the exclusion of a defense witness resulted in the conviction of a person who was probably innocent. Finally, petitioner failed to demon-

strate to the district court that preclusion was an inappropriate remedy. While the court mentioned that disciplinary proceedings against defense counsel might be appropriate, petitioner did not suggest to the trial court that preclusion was excessive to the point of being unconstitutional, nor did he suggest an alternative sanction that would have given effect to the discovery requirement. Under these circumstances, the Compulsory Process Clause was not violated, because the trial court fairly exercised its discretion in excluding a witness who had been deliberately omitted from the witness list, and whose exclusion, in the court's view, would not lead to a miscarriage of justice in the case.

CONCLUSION

The judgment of the Appellate Court of Illinois, First District, should be affirmed.

Respectfully submitted.

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JULY 1987

RESPONDENT'S

BRIEF

No. 86 - 5963

Supreme Court, U.S.

FILED

JUL 6 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAY TAYLOR,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District

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QUESTIONS PRESENTED

- I. Should this Court exercise its discretion to decline jurisdiction over the instant cause, where Defendant did not raise a Compulsory Process Clause argument before the state courts, and where that is the sole constitutional issue that Defendant now raises before this Court?
- II. Is the interpretation of the Sixth Amendment in *Washington v. Texas* and its progeny correct in light of a full analysis of the language and history of that amendment?
- III. Was any error committed by the trial court in excluding a defense witness's testimony harmless where there is no reasonable probability that the witness's cumulative and incredible testimony would have affected the jury's verdict?
- IV. Were Defendant's due process rights infringed by exclusion of a defense witness's testimony as a sanction for abuse of the discovery process, where that witness's testimony was cumulative and not credible, where there is no reasonable probability that the outcome of the trial would have differed had the testimony been admitted, and where the integrity of the truth-seeking process would have been compromised by admission of that testimony?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I.	
THIS COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE JURISDICTION OVER THE INSTANT CAUSE, WHERE DEFENDANT DID NOT RAISE A COMPULSORY PROCESS CLAIM IN THE STATE COURTS, BUT WHERE THAT IS THE SOLE CONSTITUTIONAL ISSUE THAT DEFENDANT NOW RAISES BEFORE THIS COURT	15
II.	
THIS COURT'S INTERPRETATION OF THE SIXTH AMENDMENT IN <i>WASHINGTON v. TEXAS</i> AND ITS PROGENY SHOULD BE RECONSIDERED IN LIGHT OF A FULL ANALYSIS OF THE LANGUAGE AND HISTORY OF THAT AMENDMENT	18
A. Enactment Of The Compulsory Process Clause	21
B. Construction Of Compulsory Process Clause	25
III.	
ANY ERROR COMMITTED BY THE TRIAL COURT IN EXCLUDING A DEFENSE WIT-	

NESS'S TESTIMONY WAS HARMLESS WHERE THERE IS NO REASONABLE PROBABILITY THAT THE WITNESS'S CUMULATIVE AND INCREDIBLE TESTIMONY WOULD HAVE AFFECTED THE JURY'S VERDICT

29

IV.

DEFENDANT'S DUE PROCESS RIGHTS WERE NOT INFRINGED BY EXCLUSION OF A DEFENSE WITNESS'S TESTIMONY AS A SANCTION FOR ABUSE OF THE DISCOVERY PROCESS, WHERE THAT WITNESS'S TESTIMONY WAS CUMULATIVE AND NOT CREDIBLE, WHERE THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE DIFFERED HAD THE TESTIMONY BEEN ADMITTED, AND WHERE THE INTEGRITY OF THE TRUTH-SEEKING PROCESS WOULD HAVE BEEN COMPROMISED BY ADMISSION OF THAT TESTIMONY

31

A. Scope Of Defendant's Due Process Right To Defend	31
B. Permissible Limitations On The Due Process Right To Defend	33
1. Illinois' Interest In Enforcing Its Discovery Rules	37
2. Effectiveness Of Less Severe Sanctions	39
3. Materiality And Favorability Of The Excluded Witness To The Defense ..	43
4. Evidence Of Bad Faith In The Violation Of The Discovery Rules	45
5. Reciprocal Nature Of State Rule ...	46
CONCLUSION	46

TABLE OF AUTHORITIES

CASES:	PAGE(S):
<i>Berger v. United States</i> , 295 U.S. 78 (1935) ...	37
<i>Blackmer v. United States</i> , 284 U.S. 421 (1932) ..	26
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	28
<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969) ...	17
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973) ...	
..... 12, 13, 30, 32, 33, 36	
<i>Chapman v. California</i> , 386 U.S. 18 (1967) ..	12, 13, 29, 30
<i>City of Oklahoma City v. Tuttle</i> , 105 S.Ct. 2427	
(1985)	10, 17
<i>Cooke v. United States</i> , 267 U.S. 517 (1925) ...	31
<i>Cool v. United States</i> , 409 U.S. 100 (1972)	40
<i>Crompton v. United States</i> , 138 U.S. 361 (1891) ..	33
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	17
<i>Ex Parte Harding</i> , 120 U.S. 782 (1887)	26
<i>Fendler v. Goldsmith</i> , 728 F.2d 1181 (9th Cir.	
1984)	36
<i>Green v. Georgia</i> , 442 U.S. 95 (1979)	32
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	16
<i>In re Oliver</i> , 333 U.S. 257 (1948)	31, 32
<i>Isaacs v. United States</i> , 159 U.S. 487 (1895) ..	33
<i>Link v. Wabash Railroad Company</i> , 370 U.S. 626	
(1962)	42
<i>McCray v. State of Illinois</i> , 386 U.S. 300 (1967) .	33

<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316	
(1819)	23
<i>McGoldrick v. Compagnie Generale Transatlantique</i> ,	
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(1813)	33
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..... 14, 20, 28, 29, 33, 34, 43	
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22, 1987)	12, 29, 30
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<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) ...	42
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(C.C.D. Va. 1807)	25
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<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	15, 34, 35, 38, 44, 46

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. CONST. amend. VI	<i>passim</i>
U.S. CONST. amend. XIV	<i>passim</i>
28 U.S.C.A. § 1257(3) (1966)	10, 15, 18
Ill. Rev. Stat. ch. 110A, § 412 (1985)	46
Ill. Rev. Stat. ch. 110A, § 413 (1985)	<i>passim</i>
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Maryland Declaration of Rights, art. XIX (1776) .	22
Massachusetts Declaration of Rights, art. XII (1780)	22, 23

New Hampshire Bill of Rights, art. XV (1733) ..	22, 23
Pennsylvania Declaration of Rights § 176 (1776) ..	22
Virginia Bill of Rights § 8 (1776)	22

TREATISES:

1984 Admin. Off. of the Ill. Cts.—1984 Ann. Report to the Sup. Ct. of Ill.	40
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RAY TAYLOR,

Petitioner,

VS.

STATE OF ILLINOIS,

Respondent.

**On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District**

BRIEF FOR RESPONDENT

JURISDICTION

Defendant has adequately set forth a jurisdictional statement. As explained in Argument I, however, the State believes this Court lacks jurisdiction over this case.

STATEMENT OF THE CASE

**I. State's Case Prior To Defendant's Attempt To Add A
Previously Undisclosed Witness.**

On August 6, 1981, Jack Bridges parked his automobile in front of his sister's home on Chicago's south side. (R. 133-134) Early that evening, Bridges spotted a certain Derrick Travis sitting on top of the car. When Bridges

asked Travis to get off of the car, Travis said to Bridges, "Mother F_____, you don't run nothing." (R. 135) Bridges slapped Travis in the face. (R. 135) Travis walked away, saying he would be back. (R. 135)

Shortly thereafter, Defendant Ray Taylor approached Bridges and told him he had "no business" slapping Derrick Travis. (R. 136) An argument ensued in the middle of the street, with a group of six or seven other persons joining in. (R. 137) The argument broke up, and Bridges drove to a nearby park and remained there for an hour to calm himself. Bridges then returned and again parked his car in front of his sister's house. (R. 138-139).

Bridges left his sister's home after an hour, having been told by his brother, Maurice Bethany, that Defendant and a group of men who had been circulating the neighborhood had threatened to ruin Bridges' car. (R. 140) Bridges started driving home, but became concerned for his brother's and sister's safety so he returned to his sister's neighborhood. (R. 141)

Bridges hid his car in a parking lot, and proceeded to his sister's house on foot. (R. 141) As Bridges neared the house, he saw Defendant and four other men talking with his sister in front of her house. (R. 142) Bridges heard the men ask his sister where he was. Bridges, who was standing across the street, called, "I'm over here. Come over here." (R. 143)

Before proceeding across the street, the men reached into a car and pulled out sticks and pipes. (R. 143-144) Only Defendant and another man did not retrieve weapons from the car. (R. 144) The five men then crossed the street, as did Maurice Bethany.

Maurice Bethany first noticed that Defendant was carrying a pistol as the men crossed the street. Maurice Bethany told Defendant, "You ain't going to shoot nobody

with that pistol." (R. 178) Defendant replied, "You just stay out of it." (R. 179)

When the five men approached Bridges, Bridges said that he wanted to apologize to Travis "because it don't make no sense for us to be shooting or killing one another or fighting." (R. 144) One of the men replied, "We don't want to hear nothing." (R. 144)

A fight ensued. Neither Bridges nor his brother were armed. (R. 155, 193) When Maurice Bethany swung at one of the men, Defendant said "Boom" and shot point-blank at Bethany warning, "Don't move." (R. 180)

The gang of men then attacked Jack Bridges with sticks. Bridges broke out of the crowd and began running down East 64th Street. (R. 145-146) All five men chased after Bridges, yelling, "Shoot the nigger. Shoot the nigger." (R. 146)

Attempting to avoid Defendant's gunshots, Bridges ran down the street in a zig-zag pattern. (R. 182) Defendant hit Bridges in the back with his fourth shot. (R. 146) Bridges fell and attempted to crawl beneath a car. Defendant ran to Bridges as he lay on the ground, placed his gun at the side of Bridges' head, and pulled the trigger. The gun failed to fire. (R. 147) Bridges heard Defendant say, "He's dead," and then Bridges heard a car skidding away. (R. 147)

The police arrived at the scene almost immediately. Officer Jon Davis asked Bridges if he knew who had shot him. Bridges identified Defendant as his assailant. (R. 270)

II. Defendant's Offer Of Previously Undisclosed Witness.

The foregoing summarizes the testimony of Jack Bridges and Maurice Bethany at trial. After these two State witnesses had testified, Defendant's counsel, Vester Van,

moved to amend his Answer to Discovery. Mr. Van told the court that during the testimony of the aforestated witnesses, he learned there were two other witnesses who could give relevant testimony. (J.A. 12) One of the witnesses was Alfred Wormley. Van told the court that while he did not have Wormley's address, he was going to try to locate it that evening. (J.A. 12)

The court asked Van why he had not previously listed Alfred Wormley's name in his discovery answer. Van said that while Defendant had suggested Wormley as a witness, Van had been unable to find him. (J.A. 13) The court instructed Van to bring the proffered witness to court the following day, whereupon the court would consider admitting the witness' testimony. (J.A. 14) Meanwhile, State prosecutors told the court that Van had given the State two expected defense witnesses' supposed home addresses, but that those purported addresses had turned out to be burned out buildings.

The following day, Mr. Van arrived in court with Alfred Wormley. State prosecutors commented of Van, "He has waited until this trial, selected a jury and the State has already put on its witnesses and then he adds a name." (J.A. 15) The State thus objected to admission of Wormley's testimony. (J.A. 15)

Van responded that there had been "numerous fires" in the neighborhood where the shooting had taken place, and that some of the buildings had burned down. Van commented, "It has been a tramatic (sic) experience for myself to even locate the witnesses." (J.A. 16)

The court noted that at the least, Van could have listed Wormley as a witness and could have noted that his address was unavailable. The Court said:

To do what you did is inexcusable and I have had, for the record, so many violations of discovery rules by the defense in the last few trials that it is unbe-

lievable. Since the opinion on Judge Schiller came down where he got reversed for not allowing the defense to put in an affirmative defense when they brought it up in the last moment, [*People v. Dickerson*, 119 Ill. App. 3d 568, 456 N.E.2d 920 (1st Dist. 1983)] I have had in the last two trials affirmative defenses that came in after the trial started.

(J.A. 16)

Nonetheless, the trial court permitted Defendant's counsel to conduct an offer of proof as to Alfred Wormley's testimony. In this offer of proof, Wormley testified that he was in the vicinity of Bridges' sister's home at approximately 8:00 on the night in question. Wormley said that he saw "Jack, whatever you say, Bridges," two other men, and Jack's sister sitting on a front porch. (J.A. 19) Wormley testified, "Jack had a blanket. It was two pistols in there. . .". (J.A. 19) Wormley also testified, "[t]hey were saying what they were going to do to the people. Say they were after Ray and the other people." (J.A. 19)

Continuing on his way home, Wormley testified, he ran into Defendant and his companions and warned them to watch out for Jack Bridges. (J.A. 19)

On cross-examination, Wormley stated—contrary to Vester Van's statement to the court—that he had learned he was going to be called upon to testify the previous week, when Vester Van had come to his house to ask him to testify. (J.A. 21) Van had served a subpoena upon Wormley. (J.A. 22)

The court then asked Wormley whether he was a friend of Defendant's. Wormley said he had met Defendant four months ago, after the events in question, but that the two had not discussed the case. (J.A. 23)

Wormley then testified that a woman named Donna Kerr had held the blanket containing the guns. "I guess that was [Bridges'] girlfriend at the time," Wormley tes-

tified. (J.A. 23) Wormley said he saw two pistols under the blanket, and he saw Bridges hand the blanket to Ms. Kerr. (J.A. 24)

The court asked Mr. Wormley whether his testimony was that while he did not then know Defendant, he had stopped Defendant on the street to warn him of the impending attack. (J.A. 24) Wormley testified that he recognized Defendant from the street, and that he knew the people who were with Defendant. (J.A. 24)

The State then again voiced an objection to admission of Wormley's testimony. (J.A. 25-26) In response to the State's objections, Mr. Van changed his previous story and said he thought he had listed Wormley as a witness and that his failure to do so was simply an oversight. (J.A. 27) While conceding that Wormley had not seen the incident, Van characterized Wormley as "a good part of my defense," and asked that he be allowed to testify. (J.A. 27)

The court denied Defendant's motion to add Wormley as a witness. (J.A. 28) The court found Van's conduct to be a blatant violation of the discovery rules and questioned Alfred Wormley's veracity as well. In particular, the court questioned Wormley's statement that he had stopped Defendant on the street, although Wormley did not know him, and questioned how Wormley could have seen guns wrapped in a blanket. (J.A. 28) Finally, the court informed Mr. Van that it was considering taking disciplinary measures against him. (J.A. 28)

The trial then resumed.

III. The Continuation Of The State's Evidence.

The balance of the State's case was the testimony of Bridges' sister, Jacqueline Jones, and also Charles Trotter, a family friend. Chicago police officer Jon Davis also testified.

Ms. Jones testified that Defendant rebuked Bridges for slapping Derrick Travis, and that Defendant and his associates warned Bridges that they were going to destroy his car unless he moved it. (R. 235, 238) Ms. Jones admitted that she did not see who shot her brother, but she testified she saw the gang chasing her brother down the street. After Bridges was shot, Ms. Jones ran into the middle of the street. She heard a man say, "We killed him." (R. 242, 246) Contrary to later defense testimony, Ms. Jones testified that while there may have been people sitting on their front porches during the incident, no one was sitting on the church steps. (R. 247)

Maurice Bethany lived with Ms. Jones at the time of the incident. Ms. Jones testified that Bethany did not own a gun. Ms. Jones did not know whether her brother Jack Bridges owned a gun. (R. 246)

Charles Trotter also witnessed the incident. Trotter testified that when the group of men crossed the street towards Jack Bridges, Trotter saw that "one of them had his hands behind his back and then when he got in the middle of the street I seen a silver pistol." (R. 258) In court Trotter identified Defendant as the man who had shot at Maurice Bethany, and who then ran behind Bridges shooting at him. (R. 259-260) Trotter testified that while he saw Defendant with a gun, and while he saw Defendant chasing Bridges and shooting at him, Trotter did not see Defendant shoot and strike Bridges. (R. 261)

Chicago police officer Jon Davis testified that he was summoned to the scene after the shooting took place. As Bridges was being carried into an ambulance, Officer Davis asked him who had shot him. Bridges said "Ray Ray." (R. 270) "Ray Ray" is Defendant's nick-name. (R. 136)

IV. The Defendant's Evidence.

The defense case consisted of the testimony of Hattie and Regina Algood, sisters who both knew Defendant. Prosecutors complained that the addresses Vester Van had given them for the Algood sisters had turned out to be burned out buildings. (R. 232, 277)

Both Hattie and Regina Algood testified that they witnessed the sequence of events from the church steps across the street from Jack Bridges' sister's home. (R. 278, 302) Hattie Algood testified that when she saw Defendant and the other men crossing the street towards Bridges, she saw Maurice Bethany and Donna Kerr remain on the porch steps of Ms. Jones's house. (R. 281) It was Bethany who fired the gunshots from the porch, Hattie testified. (R. 283)

On cross-examination, however, Hattie testified that Maurice fired the gunshots from the walk in front of Ms. Jones's house; Maurice never stepped into the street. (R. 293-294) Hattie Algood said that only Jack Bridges ran down 64th Street. (R. 294) When asked if she was testifying that Maurice Bethany fired down 64th Street at his own brother, Hattie responded that Bridges was shot while standing in the crowd and then he stumbled down 64th Street. (R. 295-297)

Regina Algood testified that when she saw the group of men emerge from their car, they were carrying sticks. (R. 311) Regina stated that the men held the sticks as they spoke with Bridges' sister, Jackie Jones. (R. 312) Regina further testified that Maurice fired his gun as he stood on Ms. Jones' front porch. Everybody ran, Regina testified, including Jack Bridges. Regina stated, "[b]efore I ran I seen Jackie something like stumble or something. . .". (R. 314) Maurice Bethany never left the porch while he fired the gunshots, Regina testified. (R. 315-316)

Both sisters testified that although they knew Defendant, and they knew he had been charged with murder, this was the first time they had come forward with their version of the events. (R. 300-301, 319)

V. The Jury's Verdict, The Sentence, And The Appellate History Of The Case.

During jury deliberations, the jurors advised the court that they wanted to review portions of the trial testimony. The jurors submitted a note to the court specifying that with regard to Jack Bridges' testimony, they wanted to review:

- A. How many people were chasing Jack down 64th Street?
- B. What were their names?
- C. Who did Jack see over him when the gun misfired? Did he actually see someone, or did he just see feet?

(R. 399-400) Regarding Maurice Bethany's testimony, the jurors asked to review testimony pertaining to "Who ran down the street after Jack after the first shot was fired?" (R. 400) The court reporter read the relevant portions of the transcript to the jurors. (R. 401)

After further deliberations, the jurors returned a verdict of guilt on the charges of attempted murder, aggravated battery while armed, aggravated battery causing great bodily harm, and armed violence. (R. 402)

The trial court sentenced Defendant on the attempted murder conviction only. (R. 441) Defendant was sentenced to serve a ten year term of incarceration in the Illinois Department of Corrections. (R. 520)

The Illinois Appellate Court for the First Judicial District affirmed Defendant's conviction and sentence on February 10, 1986. *The People of the State of Illinois v. Ray*

Taylor, 141 Ill. App. 3d 839, 491 N.E.2d 3 (1st Dist. 1986). Defendant's Petition for Leave to Appeal to the Illinois Supreme Court was denied on October 2, 1986. Ill. Sup. Ct. No. 63507.

SUMMARY OF ARGUMENT

I. In the state courts, Defendant invoked only Due Process Clause concerns. In the brief on the merits that Defendant has filed with this Court, however, Defendant has presented a claim of violation of only the Compulsory Process Clause. Given that this Court does not generally exercise jurisdiction over federal claims not presented in the state courts, and because the instant defect raises problems of comity, this Court should dismiss certiorari as improvidently granted in this case. 28 U.S.C.A. § 1257(3) (1966).

The State acknowledges that it failed to raise this defect in the State's brief in opposition to the petition for certiorari. That fact, even under *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985), need not be treated by this Court as a waiver by the State of the defect for several reasons. First, the Court in *Oklahoma City* made it clear that waiver was a matter within the exercise of its discretion, so that the Court is free here to deem the defect not waived by the State's failure to raise it earlier than the brief on the merits.

Second, this case is distinguishable from *Oklahoma City* on several grounds. In *Oklahoma City*, the defect that respondent failed to raise was purely procedural in nature. 105 S.Ct. at 2432. In this case, however, Defendant's claim represents a defect that is more jurisdictional in nature. Also, in *Oklahoma City* the defect was only alluded to

briefly in the brief on the merits, whereas here the State is vigorously pressing the issue and has fully briefed the question in this brief on the merits.

Moreover, there are concerns of comity with the state courts in the case at bar that were not a factor in *Oklahoma City*, which involved a case arising from the federal courts.

Accordingly, there are meritorious reasons for this Court to exercise its discretion to decline jurisdiction over this case.

II. The Compulsory Process Clause does not guarantee the admissibility of defense testimony.

By its language, the Compulsory Process Clause suggests that it is intended to protect a defendant's right to subpoena witnesses in his defense. Evidence of the Framers' intent supports this construction. Therefore, the availability of a subpoena for Wormley was enough to satisfy the Sixth Amendment.

The language of the Compulsory Process Clause was derived from state bills of rights which afforded defendants varying levels of protection for the right to produce witnesses in their favor. For example, while the Maryland Declaration of Rights simply afforded a defendant the right "to have process for his witnesses," Maryland Declaration of Rights, art. XIX (1776), the Massachusetts Declaration of Rights guaranteed defendant the right "to produce all proofs . . . and to be fully heard in his defence . . ." Massachusetts Declaration of Rights, art. XII (1780).

From this range of language, the Framers chose to guarantee defendant only "the right . . . to have compulsory process for obtaining witnesses in his favor. . ." U.S. CONST., amend. VI.

Aside from the chosen language, further evidence that the Framers intended to confer a limited right is found in the Framers' rejection of an amendment that would have guaranteed more. In the House of Representatives, it was suggested that the Clause be amended to provide that a defendant would have a protected right to delay trial if he were unable to serve process on a material witness. 1 Annals of Cong. 755-56 (1789). This motion was overwhelmingly rejected. One representative commented that "in securing [defendant] the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court." 1 Annals of Cong. 755-56 (1789).

Thus, the evidence is that the Framers intended no more than to secure for defendants the machinery for summoning favorable witnesses to trial.

Notwithstanding the language and history of the Compulsory Process Clause, this Court in *Washington v. Texas*, 388 U.S. 14 (1967) expanded the Clause to ensure the admissibility of defense testimony. This conclusion should be reconsidered in the context of this case.

III. Even should this Court find that the Sixth Amendment guarantees the admissibility of defense witness testimony, the preclusion of Wormley's testimony was not reversible error here.

First, the test by which the error should be judged is not the *Chapman* standard relied upon by Defendant. See *Chapman v. California*, 386 U.S. 18 (1967). In an analogous situation in *Rock v. Arkansas*, 55 U.S.L.W. 4925 (U.S. June 22, 1987), this Court did not apply a harmless error analysis to an asserted violation of the Due Process and Compulsory Process Clauses. Rather, this Court applied the type of due process balancing test that was set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Second, even if this Court concluded that a *Chapman v. California*, 386 U.S. 18 (1967) harmless error analysis is applicable here, the State can carry its burden of proving any error harmless beyond a reasonable doubt.

Under *Chapman*, the question is "whether there is a reasonable probability" that the error affected the jury's verdict. 386 U.S. at 24. In the case at bar, the exclusion of Alfred Wormley's testimony cannot be deemed to have affected the jury's verdict because Wormley did not witness the shooting and his testimony was cumulative.

IV. Whatever protection a defendant's right to introduce testimony has is found in the Due Process Clause's guarantee of a fair trial, not in the Compulsory Process Clause. Under the Due Process Clause, that right is limited. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

In *Chambers*, this Court held that while the Due Process Clause affords protection for the right to a fair opportunity to defend, that right may, in some circumstances, "bow to accommodate other legitimate interests in the criminal trial process." 410 U.S. at 295. The Court then applied a due process analysis to defendant's assertion that state hearsay and voucher rules had operated to exclude relevant and reliable evidence in his favor. Under that test, the Court weighed the defendant's interest in introducing the challenged statement against the state's interest in enforcing its evidentiary rules. 410 U.S. at 302.

Since *Chambers*, the balancing test has evolved to include the following factors: First, the legitimacy and strength of the State's interest in the restriction. In the case at bar, Illinois has a legitimate interest in enforcing its rule which outweighs Defendant's due process right to a fair opportunity to defend. The state's interest is the important one of protecting the integrity of the trial process and preventing trial by ambush. Protection of the state's

interest requires enforcement of the Illinois discovery sanction statute against Defendant, who, in deliberate derogation of the statute, made a last minute attempt to admit evidence which the trial court adjudged to be lacking in credibility, and which was cumulative and could not have altered the verdict. Furthermore, the admission of the proposed defense testimony of Alfred Wormley would have distorted the truth-seeking process, would have dis-served the ends of justice, and would have prejudiced the State if the trial court had not precluded it.

Second, the balancing test requires consideration of the effectiveness of lesser sanctions. Here, lesser sanctions would not have been effective in protecting the People's interest in a fair trial and would have unnecessarily disrupted the continuity of the presentation of evidence and inconvenienced the jurors and the court. Furthermore, there was no constitutional need for the trial court to substitute a lesser sanction, such as a continuance, since the trial court had assessed Wormley's proffered testimony in an offer of proof and had determined that the exclusion of his testimony would cause minimal harm to Defendant's case.

Third, the Court should evaluate the materiality of the excluded testimony. Defendant cannot demonstrate that there is a reasonable probability that the outcome of the trial might have differed had Alfred Wormley's testimony been admitted, since Wormley's testimony was essentially cumulative, and since Wormley did not even witness the shooting of Jack Bridges. Therefore, the materiality element of the due process balancing test, as defined in *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987), weighs in favor of the State.

Fourth, the bad faith of Defendant's attorney in attempting to introduce a last minute witness is another element of the due process test. Here, Defendant's coun-

sel's bad faith is indisputable and further underscores the suspect nature of the precluded witness's testimony.

Fifth, a consideration of the reciprocal nature of Illinois' discovery rules establishes that those discovery rules apply equally to the prosecution and to the defendant. *Williams v. Florida*, 399 U.S. 78 (1970).

In summary, then, Defendant's due process right to defend cannot be said to have been infringed where all five elements of the balancing test weigh in favor of the State.

ARGUMENT

I.

THIS COURT SHOULD EXERCISE ITS DISCRETION TO DECLINE JURISDICTION OVER THE INSTANT CAUSE, WHERE DEFENDANT DID NOT RAISE A COMPULSORY PROCESS CLAIM IN THE STATE COURTS, BUT WHERE THAT IS THE SOLE CONSTITUTIONAL ISSUE THAT DEFENDANT NOW RAISES BEFORE THIS COURT.

The federal statute governing this Court's certiorari jurisdiction over state court cases provides that this Court may review final judgments rendered by the highest court of a State when, *inter alia*, a federal right is "specially set up or claimed under the Constitution." 28 U.S.C.A. § 1257(3) (1966). In the brief Defendant has filed with this Court, Defendant rests his claim on the Compulsory Process Clause of the Sixth Amendment. In the state courts, however, Defendant grounded his claim solely on the Due Process Clause of the Fourteenth Amendment. Although the State did not raise this defect in its brief opposing the petition for certiorari, this Court should refrain from exercising its jurisdiction over a case presenting an issue

which the state courts have not had an opportunity to review.

In the Motion for a New Trial which Defendant presented in the trial court, he claimed that "[t]he court erred by not letting a witness for defendant testify before the Jury." (R. 412) On direct appeal, however, Defendant argued that "The trial judge abused his discretion and denied Mr. Taylor Due Process by excluding a material defense witness from testifying as a sanction for a discovery violation." (Dft's State App. Ct. Brief at 28) Similarly, in his Petition for Leave to Appeal to the Illinois Supreme Court, Defendant argued that "The Appellate Court's holding that exclusion of a material defense witness was a proper sanction for a discovery violation is in conflict with every reported decision of this State and violates Due Process of law." (Dft's Petition for Leave to Appeal at 6) In sum, Defendant's claims regarding the exclusion of Alfred Wormley's testimony in the trial court rested completely on the Due Process Clause.

This Court has indicated that it looks with disfavor upon federal claims that are presented before this Court without first having been presented in the state courts, even when the factual basis of those claims has been presented on both the state and federal levels. *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); *Picard v. Connor*, 404 U.S. 270, 275-278 (1971). See generally, *Illinois v. Gates*, 467 U.S. 213 (1983). Having failed to comply with this requirement, Defendant's arguments should be dismissed.

The only rationale for circumventing Defendant's default would be for this Court to construe the vague language in Defendant's claims in the state courts as somehow embodying references to the Compulsory Process Clause as incorporated by the Due Process Clause of the Fourteenth Amendment. However, while there is support for this Court's review of cases where a petitioner has failed to

cite "book and verse" in the state courts, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982); accord *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), this Court has evinced a decided reluctance to construe reliance on a particular constitutional provision as reliance on a constitutional provision that might also have been correctly raised in the state courts. *Picard v. Connor*, 404 U.S. 270 (1971).

Important policy considerations countervail against waiving defects such as that presented by this case. First, comity between the federal and the state courts is damaged when state courts are not first given an opportunity to consider constitutional arguments. *Webb v. Webb*, 451 U.S. 493 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). Second, when a specific federal claim is not presented in the state courts, the state court record is likely to be inadequate since the record was not compiled in view of that federal question. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Certainly these considerations apply in the case at bar, where the state courts were given no specific opportunity to entertain Defendant's compulsory process argument, and where the state court record accordingly reflects no application of that constitutional provision to these facts.

As noted, however, the State did not challenge the jurisdictional defect presented in this case in the State's brief in opposition to the petition for certiorari. In *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985), this Court held that when a respondent fails to raise a non-jurisdictional defect prior to the brief on the merits, this Court may elect to deem the defect waived.

Oklahoma City is distinguishable from the case at bar in two respects.

First, *Oklahoma City* involved respondent's failure to challenge a procedural, non-jurisdictional defect. In the case at bar, however, Defendant's failure to present his Compulsory Process Clause claim before the state courts is a defect more accurately characterized as jurisdictional in nature. 28 U.S.C.A. § 1257(3) (1966).

Second, *Oklahoma City* involved a cause of action that was litigated in the federal courts. Hence, comity was not a consideration, as it is in the case at bar, since it is the state courts that were not given the opportunity to review Defendant's Compulsory Process claim.

The State accordingly requests that this Court refrain from exercising jurisdiction over the instant cause.

II.

THIS COURT'S INTERPRETATION OF THE SIXTH AMENDMENT IN *WASHINGTON v. TEXAS* AND ITS PROGENY SHOULD BE RECONSIDERED IN LIGHT OF A FULL ANALYSIS OF THE LANGUAGE AND HISTORY OF THAT AMENDMENT.

In our view, the Compulsory Process Clause of the Sixth Amendment, properly interpreted, guarantees only that defendants have subpoena power to produce witnesses. In this case, where the defense was able to subpoena witness Alfred Wormley and present him for an offer of proof at trial, Defendant's Compulsory Process rights were fully protected. The distinct question whether a subpoenaed and produced witness's testimony can be excluded for a violation of the discovery process so egregious that it threatens the trial's fundamental search for truth is measured not by the Compulsory Process Clause but by the Due Process Clause. No Compulsory Process Clause concerns are raised by the Illinois discovery sanction statute in general, nor the trial court's application of it in this case, where Wormley's name was not listed in pre-trial discovery, where his testimony was not credible, and

where the State would have been prejudiced by permitting Defendant to put Wormley on the stand.

The trial court excluded Wormley's testimony because it found that the proffered testimony lacked credibility, and that Vester Van's failure to reveal Wormley's name prior to trial as required by Illinois Supreme Court Rule 413¹ was a tactic conceived in bad faith. (J.A. 28) The trial court's exclusion of Wormley's testimony for violation of Rule 413 was based on Illinois Supreme Court Rule 415(g)(i), which provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

Ill. Rev. Stat. ch. 110A, § 415(g)(i) (1985).

Application of the aforestated statute to preclude Alfred Wormley's testimony did not infringe Defendant's Sixth Amendment right to the Compulsory Process Clause within the meaning of the amendment's language and history.

¹ Defendant's obligation to disclose his defense witnesses was mandated by Illinois Supreme Court Rule 413, which provides in pertinent part:

Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements. . .

Ill. Rev. Stat. ch. 110A, § 413(d)(i) (1985).

Because this Court has heretofore refrained from clarifying the contours of the Compulsory Process Clause, *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1000 (1987), there is a divergence of opinion over the scope of protection afforded by the Clause. Based on *Washington v. Texas*, 388 U.S. 14 (1967), a majority of the courts have, we believe, erroneously stretched the Compulsory Process Clause to protect the admissibility of defense testimony. See generally Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 99 (1974). A careful analysis of the language and history of the Clause, however, demonstrates the propriety of some scholars' view that the Clause assures only that defendants are afforded the subpoena power they lacked at common law. See, Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials*, 9 Ind. L. J. 711, 767 (1976) ("Clinton"); 8 J. Wigmore § 2191, at 68-70 (rev. ed. J. McNaughton 1961) (Compulsory Process Clause intended only to secure for defendants the subpoena power they lacked at common law).

The latter view is the only one supported by the language of the Clause and the intent underlying it. These suggest that the Framers merely intended to protect a defendant's right to invoke the authority of the government for the purpose of compelling the attendance of witnesses in his favor. Once a state court defendant has been afforded that right, state rules govern the question of evidentiary admissibility. The federal constitution governs the question of the admissibility of defense testimony only to the extent that Due Process principles are offended by the operation of a state evidentiary rule.

Before discussing the due process issue, the State will first identify the very limited role of the Compulsory Process Clause in the case at bar.

A. Enactment Of The Compulsory Process Clause.

A review of the circumstances surrounding the adoption of the Compulsory Process Clause helps in assessing the scope of protection afforded by that Clause. Early American trial practice generally resembled British practice. Under sixteenth century British practice, defendants were not entitled to summon witnesses in their defense, S.W. Holdsworth, *History of English Law* 192-93, 195 (3d ed. 1944), apparently because it was deemed unseemly for witnesses to testify "against" the Crown. See generally Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 83 (1974).

Early American law followed the practice of restricting defense witness testimony. For example, under New York practice, defendants had limited access to counsel, restricted subpoena privileges, and restricted access to the bill of indictment. Clinton at 727.

It was against this backdrop that the Sixth Amendment was adopted. The Sixth Amendment significantly expanded defendants' rights by affording constitutional protection for the right to compulsory process, as well as the right to confront witnesses, the right to counsel, and the right to be informed of the nature of the accusation. U.S. Const., amend. VI.

There is no indication, however, that the Framers intended by the Compulsory Process Clause to take the even more drastic step of ensuring the admissibility of defense witness testimony. Indeed, the evidence is to the contrary.

When James Madison proposed adoption of the Bill of Rights in 1789, the First Federal Congress evidently considered the matter to be of little urgency. 2 B. Schwartz,

The Bill of Rights: A Documentary History 1145 (1971) ("Schwartz"). It was clear, however, that the citizenry deemed adoption of a bill of rights to be critical; indeed, the states' reluctance to adopt a federal constitution stemmed in part from a reluctance to adopt the document without a bill of rights.

Madison therefore pressed the matter before Congress with an eye towards drafting a bill that would spark as little dissent as possible, culling the language of the Sixth Amendment from state constitutions' bills of rights. L. Levy, *Constitutional Opinions: Aspects of the Bill of Rights*, 119 (1986).

The state bills of rights Madison chose from provided varying levels of protection for the right to present defense witnesses. At one end of the spectrum, the Maryland Declaration of Rights simply afforded a defendant the right "to have process for his witnesses." Maryland Declaration of Rights, art. XIX (1776), reprinted in Clinton at 729. The Virginia and Pennsylvania bills of rights guaranteed defendant the right "to call for evidence in his favour." Virginia Bill of Rights § 8 (1776); Pennsylvania Declaration of Rights § 176 (1776).

At the other end of the spectrum, the Massachusetts and New Hampshire bills of rights provided that "every subject shall have a right to produce all proofs, that may be favorable to him; . . . and to be fully heard in his defense . . .". Massachusetts Declaration of Rights, art. XII (1780); accord New Hampshire Bill of Rights, art. XV (1733), reprinted in Clinton at 730.

From the varying language of these state constitutions, James Madison rejected the encompassing language of the Massachusetts and New Hampshire guarantees, electing

instead to propose that a defendant merely be afforded "the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. Const., amend. VI.

In construing the meaning of this Clause, we turn first to the language used. Normally, when constitutional language unambiguously requires a particular conclusion, the text is held to be dispositive. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (stating that "we must never forget, that it is a *constitution* we are expounding" (emphasis in original)). The text of the Compulsory Process Clause is convincingly dispositive.

If the Framers had intended to protect the admissibility of defense evidence, they could have used the language of the Massachusetts and New Hampshire bills of rights which gave express protection to the right to admit defense evidence. See *supra* at p. 22. Instead, the Framers deliberately settled on conciliatory language guaranteeing *only* the right "to have compulsory process. . .". U.S. Const., amend. VI. They thus left the Compulsory Process Clause utterly devoid of language suggesting that they intended the Clause to protect the admissibility of evidence.

The recorded debate further supports this interpretation of the Compulsory Process Clause. The Annals of Congress for 1789 report the following exchange in the House of Representatives:

MR. BURKE moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence.

MR. HARTLEY said, that in securing him the right of compulsory process, the Government did all it

could; the remainder must lie in the discretion of the court.

MR. SMITH, of South Carolina, thought the regulation would come properly in, as part of the judicial system.

The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41.

1 Annals of Cong. 755-56 (1789).

Mr. Hartley's comment, that the Clause secured to defendant the right of compulsory process, and that the remainder lay in the trial court's discretion, conveys in straightforward fashion that the Clause guarantees subpoena power only.

Contrary to the Court's statement in *Washington v. Texas*, 388 U.S. 14 (1967), that the Compulsory Process Clause must protect the admissibility of defense evidence, because "the Framers . . . did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use," *Id.* at 23, Representative Hartley's comment makes clear that the Framers did not intertwine the concept of evidentiary admissibility with the concept of subpoena power. Rather, the Framers gave constitutional protection to defendant's right to compel the attendance of witnesses, and expressly declined to constitutionalize the question of the admissibility of defense witnesses' testimony.

The vote recorded in the excerpted exchange also lends weight to this conclusion. Representative Burke's suggested amendment would have given a defendant the constitutionally protected right to delay trial if defendant was unable to serve subpoena on a material witness. Unwilling to go beyond ensuring defendants the machinery for summoning witnesses to trial, however, the representatives rejected Burke's motion by a vote of 41 to 9.

The Framers' vote thus makes clear that having granted to defendants the machinery for compelling the attendance of witnesses, the Framers left it to the discretion of the trial courts how to deal with any consequent problems. Hence, Representative Smith's comment that he thought "the regulation would come properly in, as part of the judicial system." 1 Annals of Cong. 755-56 (1789).

In summary, then, the language of the Sixth Amendment and the House debate on the Clause clearly reflect the Framers' intent to protect defendant's subpoena power only by the Compulsory Process Clause.

B. Construction Of Compulsory Process Clause.

Notwithstanding that neither the language of the Clause nor the circumstances of its adoption support a broad reading, protecting the admissibility of defense testimony, the Court in *Washington v. Texas*, 388 U.S. 14 (1967), held that the Clause not only ensures the attendance of witnesses at trial, but also protects the admissibility of witnesses' testimony. 388 U.S. at 19. As Justice Harlan's concurring opinion in *Washington* more accurately observes, however, the admissibility of evidence is a Due Process concern, and not a Compulsory Process Clause violation. 388 U.S. at 24. To the extent that *Washington* suggests more than this, it should be reconsidered.

Prior to *Washington*, the lead cases construing the Compulsory Process Clause were Chief Justice John Marshall's opinions in the trial of Aaron Burr. *United States v. Burr*, 25 F. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807). In *Burr*, the Court gave force to the plain import of the Compulsory Process Clause by holding that defendants have the right to use subpoenas to compel the attendance of witnesses at trial and to compel the production of material documents as well. 25 F. Cas. at 33-35.

After *Burr*, courts demonstrated a decided reluctance to treat the exclusion of defense evidence as an issue of constitutional magnitude. Instead, in cases subsequent to *Burr*, the question of exclusion of defense evidence was treated by the Court as a matter of statutory construction, *Rosen v. United States*, 245 U.S. 467, 471-472 (1918); *United States v. Van Duzee*, 140 U.S. 169, 173 (1891); *United States v. Reid et al.*, 53 U.S. (12 How.) 360 (1851), or, alternatively, the Court avoided the question altogether by disposing of the cause on other grounds. See *Pate v. Robinson*, 383 U.S. 375, 378 n.1 (1966); *Blackmer v. United States*, 284 U.S. 421, 442 (1932); *West v. Louisiana*, 194 U.S. 258, 262 (1904); *Ex Parte Harding*, 120 U.S. 782 (1887).

Thus, the *Washington* Court wrote on a virtually clean slate in applying the Compulsory Process Clause to a state evidentiary exclusion issue. In *Washington*, a Texas trial court had barred the defendant from calling to testify an accomplice who would have provided exculpatory testimony. The trial court's decision was dictated by a state statute providing that persons charged or convicted as co-participants in the same crime could not testify for one another, although the co-participant could testify for the state. 388 U.S. at 16-17.

In resolving the question whether the Texas statute was constitutional, the Court first determined that the right to compulsory process for obtaining witnesses is incorporated against the states by the Due Process Clause of the Fourteenth Amendment. 388 U.S. at 17-18. The Court then ruled that the Texas statute created a *per se* exclusion which operated arbitrarily to exclude relevant and material testimony from a witness who was physically and mentally capable of testifying to events he had personally observed. 388 U.S. at 23. The Court on these unique facts held that the statute infringed the defendant's rights under the Compulsory Process Clause. It was in this con-

text that the Court wrote, "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.*

There are two significant infirmities in the *Washington* analysis.

First, the *Washington* Court suggested that the Texas disqualification statute at issue in that cause was a hold-over from the common law, and that the Sixth Amendment was intended to abolish such statutes. 388 U.S. at 19-23. In point of fact, however, the Texas statute was a nineteenth century development. See *Clinton* at 766-767. Hence, the argument that the Sixth Amendment was intended to abolish this type of statute is anachronistic.

Second, the *Washington* Court reasoned that defense testimony is guaranteed admissibility under the Compulsory Process Clause because the Framers could not have intended to commit the "futile act" of giving defendant the right to summon witnesses whose testimony could be barred. At the same time, however, the Court carved an exception for testimonial privileges and for certain state rules based on incapacity. 388 U.S. at 23 n.21. The *Washington* opinion thus accepts the power of a legislature or court to exclude defense testimony without offering any explanation as to under what standard the Compulsory Process Clause might guarantee the admissibility of some categories of defense testimony but not others.

The flaws in the *Washington* Court's overbroad construction of the Compulsory Process Clause are exposed by subsequent cases where asserted Compulsory Process Clause violations are analyzed under the Due Process Clause.

For example, in *Webb v. Texas*, 409 U.S. 95 (1972), the next case to invoke the Clause after *Washington*, the Court applied a due process analysis to intimidation of

a defense witness by a trial court which amounted to *de facto* exclusion of testimony. This Court characterized the trial court's conduct as a Sixth Amendment violation, but then proceeded to apply a due process analysis. 409 U.S. 95, 98 (1972).

In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the question before the Court was whether the government's policy of pre-trial deportation of illegal aliens who may have been potential defense witnesses violated the Compulsory Process Clause. This Court expressly borrowed concepts from the Due Process Clause of the Fifth Amendment in arriving at its decision. 458 U.S. at 867-872.

In *Pennsylvania v. Ritchie*, 107 S.Ct. 989 (1987), this Court addressed a challenge to the constitutionality of a Pennsylvania statute shielding certain youth records. 107 S.Ct. at 994. This Court concluded that while the contours of the Compulsory Process Clause had not yet been defined, the cases construing the Clause established at a minimum that defendants have the right to government assistance in compelling the attendance of witnesses, and that defendants have the right to put before the jury evidence that might influence the question of guilt. 107 S.Ct. at 1000-1001. Nonetheless, the Court noted, a claimed right to discover exculpatory evidence was traditionally analyzed under the "broader protections" of the Due Process Clause of the Fourteenth Amendment. 107 S.Ct. at 1001, citing *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Wardius v. Oregon*, 412 U.S. 470 (1973). This Court accordingly held that while it was not prepared to state how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment, at a minimum, the Compulsory Process Clause provides no greater protection than the Due Process Clause. *Id.*

Finally, in *Rock v. Arkansas*, 55 U.S.L.W. 4925 (U.S. June 22, 1987), this Court held that a state statute precluding on a *per se* basis the use of hypnotically refreshed testimony infringed defendant's right to testify as protected by the Due Process Clause, the Compulsory Process Clause, and the Fifth Amendment. This Court then applied a due process analysis, concluding that a State's legitimate interest in barring unreliable evidence does not justify a *per se* exclusion because that evidence might be unreliable in a particular case. 55 U.S.L.W. at 4930.

Thus, this Court's jurisprudence recognizes that the Compulsory Process Clause guarantees process alone, and evidentiary questions, if constitutional, are due process concerns.

III.

ANY ERROR COMMITTED BY THE TRIAL COURT IN EXCLUDING A DEFENSE WITNESS'S TESTIMONY WAS HARMLESS WHERE THERE IS NO REASONABLE PROBABILITY THAT THE WITNESS'S CUMULATIVE AND INCREDIBLE TESTIMONY WOULD HAVE AFFECTED THE JURY'S VERDICT.

The foregoing analysis establishes that the Compulsory Process Clause does not guarantee the admissibility of defense witness testimony, and that the Sixth Amendment is therefore not implicated in this case. However, if this Court finds to the contrary, the conviction can still be affirmed. The State satisfies the Due Process test suggested by this Court's analysis in *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987), and *Rock v. Arkansas*, 55 U.S.L.W. 4925, 4928 (1987). Moreover, the State can even meet its burden, under Defendant's analysis, of proving the alleged error "harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967), if exclusion of the defense testimony was error under a Sixth Amendment analysis.

In *Rock* the state's *per se* exclusion of hypnotically refreshed testimony was found to have violated defendant's right to testify, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. 55 U.S.L.W. at 4927. However, echoing language from the due process balancing test set forth in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), this Court assessed the constitutionality of the Arkansas statute by measuring the state's interest in enforcing its *per se* rule against defendant's interest in introducing the testimony. 55 U.S.L.W. at 4928. Hence, a due process balancing test (see *infra* at 36 for expanded discussion of Due Process balancing test) is evidently applicable even in the context of a Sixth Amendment violation. As discussed in Part IV, Defendant cannot demonstrate a due process violation in the case at bar where his proffered witness's testimony was not material and where the integrity of the truth-seeking process would have been compromised by admission of his testimony.

Should this Court determine that the harmless error analysis Defendant has posited is the correct test, however, the State can meet that test too. Under *Chapman v. California*, 386 U.S. 18 (1967), the question is whether there is a "reasonable probability" that the error affected the jury's verdict. 386 U.S. at 24. Here, the exclusion of Alfred Wormley's testimony, if error at all, was harmless beyond a reasonable doubt because, as explained in detail *infra* at pp. 43-45, Wormley's testimony was essentially cumulative and not credible according to the trial judge, and because Wormley did not witness Jack Bridges' shooting.

IV.

DEFENDANT'S DUE PROCESS RIGHTS WERE NOT INFRINGED BY EXCLUSION OF A DEFENSE WITNESS'S TESTIMONY AS A SANCTION FOR ABUSE OF THE DISCOVERY PROCESS, WHERE THAT WITNESS'S TESTIMONY WAS CUMULATIVE AND NOT CREDIBLE, WHERE THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE DIFFERED HAD THE TESTIMONY BEEN ADMITTED, AND WHERE THE INTEGRITY OF THE TRUTH-SEEKING PROCESS WOULD HAVE BEEN COMPROMISED BY ADMISSION OF THAT TESTIMONY.

A. Scope Of Defendant's Due Process Right To Defend.

The Compulsory Process Clause guarantees the availability but not the admissibility of defense witness testimony. To the extent that the admission of such testimony is protected, the source of that protection is the Due Process Clause of the Fourteenth Amendment. That clause creates a limited right to defend that includes the right to have defense evidence admitted. The question then is to what degree the Due Process Clause assures admissibility of defense testimony.

The right to defend was recognized under federal criminal contempt law in *Cooke v. United States*, 267 U.S. 517 (1925), where the Court wrote:

Due Process of law . . . requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes . . . the right to call witnesses to give testimony . . .

267 U.S. at 537.

The *Cooke* rule was applied under the Fourteenth Amendment to state criminal contempt proceedings in *In re Oliver*, 333 U.S. 257 (1948), where the Court concluded that a defendant's Due Process right to defend includes "as a minimum, a right to examine the witnesses . . . to offer

testimony, and to be represented by counsel." 333 U.S. at 273.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court affirmed that the Due Process Clause guarantees defendants the right to a fair opportunity to defend, but held that the right may give way to a state's competing interest in enforcing a rule designed to enhance the integrity of the criminal trial process. Thus, this Court noted in *Chambers* that:

Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interests be closely examined.

410 U.S. at 295 (citations omitted).

After weighing the legitimacy of the state hearsay and voucher rules in *Chambers* against defendant's interests in introducing the testimony, this Court concluded that the defendant's interest outweighed the state's. First, the Mississippi voucher rule was deemed to be an inappropriate remnant of "primitive" English trial practice. 410 U.S. at 296. Second, while the state's hearsay rule may have been valid in general, the particular rejected hearsay testimony was so reliable and so critical to defendant's case that the mechanistic application of the rule violated defendant's due process rights. 410 U.S. at 302.

Similarly, in *Green v. Georgia*, 442 U.S. 95 (1979), this Court held that defendant's Due Process rights were infringed by a Georgia hearsay rule which operated to exclude reliable and highly relevant testimony defendant sought to introduce in the sentencing phase of his capital trial. 442 U.S. at 96-97.

Notwithstanding *Chambers* and *Green*, this Court has held in a variety of other circumstances that defendants can be constitutionally precluded from introducing particular testimony at trial.

B. Permissible Limitations On The Due Process Right To Defend.

Even *Chambers* recognized that a defendant's Fourteenth Amendment due process right to defend, which includes the right to submit relevant information to the trier of fact, can be qualified. 410 U.S. at 295. The admissibility of defense testimony has long been subject to hearsay rules, *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813), and testimonial privileges, *McCray v. State of Illinois*, 386 U.S. 300 (1967).

Furthermore, this Court has made clear that a defendant's right to introduce evidence may depend upon compliance with reasonable state rules. For example, in *Isaacs v. United States*, 159 U.S. 487, 489 (1895), the Court upheld the trial court's refusal to grant defendant's request for a continuance despite the absence of a material defense witness. The Court noted that defendant had not demonstrated that he had used due diligence in procuring the attendance of the witness. Further, defendant had not shown that the witness's testimony was non-cumulative. And in *Crumpton v. United States*, 138 U.S. 361, 364-365 (1901), the Court, noting that the witnesses' testimony was apparently not material, upheld the trial court's refusal to order the government to subpoena three defense witnesses because it would have delayed the trial.

More recently, this Court has specifically considered the Due Process Clause before upholding state statutes limiting defendants' right to submit information to the trier of fact. For example, in *Pennsylvania v. Ritchie*, 107 S.Ct.

989 (1987), this Court reviewed the constitutionality of a state law precluding defendants from introducing privileged child abuse records. This Court recognized the state's legitimate interest in enforcing its privilege rule, and held that the interest could preclude disclosure in some, but not all, circumstances. 107 S.Ct. at 1002. The Court concluded that preclusion of trial use of privileged information by a defendant would not violate due process principles if, before excluding the information, the trial court undertook a materiality inquiry and determined that the privileged information would probably not change the outcome of the trial.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld an alibi notice statute which provided for exclusion of alibi witnesses if the defendant failed to give advance notice of his alibi defense. The *Williams* Court categorically rejected defendant's argument that the alibi notice requirement violated his due process and fair trial rights, principally because that statute imposed a reciprocal duty on the state to disclose alibi rebuttal witnesses. 399 U.S. at 81. Compare *Wardius v. Oregon*, 412 U.S. 470 (1973) (alibi notice statute held violative of Due Process because statute did not provide for reciprocal discovery). Characterizing the state's interest in protecting against eleventh-hour defense testimony "obvious and legitimate", *id.*, the *Williams* Court concluded:

The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

399 U.S. at 82.² See also *United States v. Nobles*, 422 U.S. 225, 241 (1975) (under Sixth Amendment principles, right to present testimony is conditioned on compliance with legitimate demands of adversary system).

That there is "ample room" under the Due Process Clause for discovery sanctions such as the one at issue here which is designed to enhance the truth-seeking process is further reflected by the fact that 36 states³ have enacted statutes comparable to Illinois', and that 35 states⁴

² The *Williams* Court specifically reserved the question of the constitutionality of imposing the preclusion sanction, since the sanction was not imposed in that case. 399 U.S. 78, 83 n.14 (1970).

³ Ala. R. Civ. P. 37(b)(2)(B); 17 A.R.S. Rules of Criminal Procedure, Rule 15.7(d); A.R. Cr. P., Rule 19.7; Colo. R. Cr. Pro. 16(III)(g); D.C.R. Crim. P. 16(d)(2); Del. Super. Ct. Cr. R. 16(f); Fla. R. Cr. P. 3.220(j)(1); Ga. Code Ann. Sec. 17-7-192 (1982); Iowa R. Crim. P. 13; Kan. Crim. Proc. Ann. Sec. 22.3212(7) (Vernon Supp. 1987); Ky. Rev. Stat. Sec. Crim. Proc. R. 7.24(9); La. Code Crim. Proc. Ann. art. 729.5(A) (West 1981); Md. Crim./Causes Code Ann. Sec. 4-263(i) (1987); Mass. Ann. Laws Crim. Pro. R. 14(C)(2) (Michie/Law Co-op); Minn. R. Crim. P. 9.03(8) (Supp. 1987); Mo. R. Crim. P. 25.16; Mont. Code Ann. Sec. 46-15-329 (1985); Neb. Rev. Stat. Sec. 29-1919 (1979); Nev. Rev. Stat. Sec. 174.295 (1986); N.M. Stat. Ann. Sec. 5-505(B) (1986); N.Y. Crim. Proc. Sec. 240.70(1) (Consol. 1986); N.C. Gen. Stat. Sec. 15A-910(3) (1983); N.D.R. Crim. P. 16(d)(2); Ohio R. Crim. P. 16(E)(3); Or. Rev. Stat. Sec. 135.865 (1984); Pa. R. Crim. P. 305(D); R.I.R. Crim. P. 16(i); S.D. Codified Laws Ann. Sec. 23A-13-17 (1979); Tenn. R. Crim. P. 16(d)(2); Utah Code Ann. Sec. 77-35-16(g) (1982); Vt. R. Crim. P. 16.2(g)(1); Va. Sup. Ct. R. 3:A:11(g); Wash. Superior Ct. Crim. Rules 4.7(h)(7); W. Va. Court Rules 16(a)(2); Wis. Stat. Ann. Sec. 971.23(7) (West 1985); Wyo. R. Crim. P. 18(h).

⁴ 17 A.R.S. Rules of Criminal Procedure 15.2(b); A.R. Cr. P., Rule 18.3; Colo. R. Cr. Pro. 16(II)(d); Conn. Super. Ct. R. Sec. 766; D.C.R. Crim. P. 12.1(d); Fla. R. Cr. P. 3.200; Ind. Code Ann. Sec. 34-36-4-3 (West 1986); Iowa R. Crim. P. 11; Kan. Crim. Proc. Code Ann. Sec. 22.3218(4) (Vernon Supp. 1987); La. Code Crim. Proc. Ann. art. 727(d) (West 1981); Me. R. Crim. P. 16A(b); Md. Crim. Causes Code Ann. Sec. 4-263(i) (1987); Mass. Ann. Laws Crim. Pro. R. 14(b)(1)(D) (Michie/Law Co-op.); Mich. Comp. Laws Ann. Sec. 768.20 (1982); Minn. R. Crim. P. 9.03(8) (Supp. 1987); Mo. R. Crim.

(Footnote continued on following page)

have enacted alibi notice statutes. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall v. Martin*, 467 U.S. 253, 268 (1984). (citations omitted).

Under the due process balancing test that has evolved since *Chambers*, a trial court may preclude the testimony of a defense witness because of defendant's failure to comply with discovery rules. The test requires consideration of (1) the state's interest in enforcing its discovery rules, *Chambers v. Mississippi*, 410 U.S. 284, 295, 302 (1973); (2) the effectiveness of less severe sanctions, see *Fendler v. Goldsmith*, 728 F.2d 1181, 1187 (9th Cir. 1984); (3) the materiality of the excluded testimony to the outcome of the case, see *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); (4) any evidence of bad faith as the cause of the violation of the discovery rules, see *Fendler*, 728 F.2d at 1187; and (5) an assessment of whether a state's discovery statutes are reciprocal. *Wardius v. Oregon*, 412 U.S. 470, 475-476 (1973).

Each of the elements of the balancing test is considered in turn in the context of the instant facts.

⁴ continued

P. 25.05(A)(5); Mont. Code Ann. Sec. 46-15-329 (1985); Nev. Rev. Stat. Sec. 174.087(4) (1986); N.J. Crim. Pro. R. 3:5-9; N.M. Stat. Ann. Sec. 5-508(c) (1986); N.Y. Crim. Proc. Sec. 250.20(3) (Consol. 1986); N.D.R. Crim. P. 12.1(c); Ohio R. Crim. P. 12.1; Or. Rev. Stat. Sec. 135.455 (1984); Pa. R. Crim. P. 305(D); R.I.R. Crim. P. 16(c)(i); S.D. Codified Laws Ann. Sec. 23A-9-4 (1979); Tenn. R. Crim. P. 12.1(d); Utah Code Ann. Sec. 77-14-2(3) (1982); Vt. R. Crim. P. 12.1(e); Va. Sup. Ct. R. 3A:11(c)(2); Wash. Superior Ct. Crim. Rules 4.7(b)(2)(xii); W. Va. Court Rules 12.1(d); Wis. Stat. Ann. Sec. 971.23(8) (West 1985); Wyo. R. Crim. P. 16.1(a).

1. Illinois' Interest In Enforcing Its Discovery Rules.

Illinois' discovery rules and exclusion sanctions and others like them⁵ are designed to protect the truth-seeking process. *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161, 163 (7th Cir. 1985), cert. denied, 106 S.Ct. 1281 (1986). When a defendant is permitted to conduct a trial by ambush, the truth-seeking process is distorted and the ends of justice thwarted. Given that, the state's interest in enforcing the particular discovery rule at issue here is strong. Yet, the lower courts have consistently understated states' interest in enforcing such rules, focusing instead solely on the perceived impropriety of "penalizing" a defendant for his attorney's misdeeds.

Whether a defendant has been unfairly prejudiced by his attorney's misconduct is only the beginning of the inquiry. The people of the State have the same interest as a defendant in ensuring that a trial is fair. Therefore, the harm to the defendant and the appropriateness of holding him accountable for his counsel's conduct must be weighed against the State's interest in protecting the fairness of the trial against the prejudice that results to the State when discovery rules are flouted. Keeping in mind that the dual purpose of our criminal justice is "that guilt shall not escape or innocence suffer," *Berger v. United States*, 295 U.S. 78, 88 (1935), the overarching question must be whether admission here of testimony by a previously undisclosed and consequently uninvestigated and untested witness detracts from the integrity of the trial to the extent that the truth-seeking process is irredeemably impaired. See generally *United States v. Nobles*, 422 U.S. 225 (1975). It is obvious that ambush testimony detracts from the integrity of the trial, convert-

⁵ See footnote 3 at p. 35 listing 36 discovery sanction statutes and footnote 4 at pp. 35-36 listing 35 alibi notice statutes.

ing the trial into a poker game rather than a search for truth. *Williams v. Florida*, 399 U.S. 78, 82 (1970).

Both sides are damaged by admission of evidence without prior notice. When prosecutors are given due notice of the witnesses a defendant intends to call, prosecutors can fulfill their duty of seeking justice by interviewing the witness, researching the witness's background, and investigating other sources of evidence uncovered by the witness. With notice, the prosecution can determine if an alibi is true so that the case should be dismissed or, on the other hand, if it is necessary to find rebuttal witnesses. In either case, the ends of justice are well served. When prosecutors are not given advance notice of witnesses, however, they cannot adequately test the veracity of the witnesses' testimony and the People's right to a fair trial is compromised.

The instant cause epitomizes this problem and highlights the constitutional legitimacy of the Illinois discovery rules' limitation on Defendant's right to defend. Here, defense attorney Van failed to divulge Alfred Wormley's name until after the jury was empanelled and the judicial process underway, although Van clearly knew before that not only that he intended to call Wormley to testify but also Wormley's address. Even after Van had disclosed Wormley's name, Van continued to impede the prosecution by failing to give the prosecution, until just prior to the offer of proof, information he had that would enable the prosecution to initiate a background check on Wormley. (J.A. 15)

Had the trial court admitted Wormley's testimony, the prosecutors would have been put in the position of attempting to cross-examine a witness whose testimony and whose background the prosecutors knew nothing about, as was Van's undoubted intention. The point is not that the prosecutors would have been inconvenienced or dis-

advantaged although they would have been. The point is that the truth-seeking process would have been impaired.

2. Effectiveness Of Less Severe Sanctions.

Another element that must be considered in determining whether it is constitutional to exclude testimony by a proffered defense witness is whether imposition of a less severe sanction would be appropriate and effective.

A trial court could almost always impose a lesser sanction than witness preclusion, as, for example, the granting of a continuance while prosecutors investigated last minute evidence, but that sanction would not have been appropriate here. Criminal trials do not take place in a vacuum. Courts cannot indulge errant attorneys and inconvenience jurors, prosecutors, and court officials by constantly granting continuances. More importantly, a continuance unnecessarily and unjustly disrupts the trial process. If a continuance is granted after the prosecution has presented witnesses, then the testimony of those witnesses is apt to grow "cold" as the jurors await the resumption of the trial. The outcome of the trial may thus be affected. Epstein, 55 J. Crim. L., Criminology & Police Sci. 29, 35-36 (1964). The instant cause illustrates this danger. If the trial court had granted a continuance, that continuance would have come after two prosecution witnesses had testified. The testimony of those witnesses as to the fast-paced incidents at issue was not so simple that the jurors could have been relied upon to recall the important nuances of the testimony with a high degree of accuracy. Therefore, it is not enough to simply ask whether a lesser sanction is available. Rather, the question must be whether a lesser sanction is appropriate and equally effective in light of the surrounding circumstances.

As the trial court noted in the instant case, defense counsel's dilatory conduct had already caused delay and it

promised to cause more delay yet. The trial court judge commented to Mr. Van during Wormley's offer of proof:

. . . what am I going to do? I am interested in finishing the case because I have got to try. I have a fourth term case that I would like to start working on Friday and here I am.

Now, the Appellate Court will always say well, the Judge should have given 24 hours or allowed the State to talk to that witness ahead of time but that still does not accomplish getting the State a B of I. In 24 hours they could do it. Now I am sitting here and the jury is cooped up in the jury room. They are ready to go. I quit yesterday at 2:30. Am I going to send them home now without hearing anything and just have a super waste of judicial time?

(J.A. 16-17)

In 1984 in the Circuit Courts of Cook County, alone, 330 judges presided over a total of 6,679,113 cases. Of that number, the circuit courts disposed of 4,246,133 cases. 1984 Admin. Off. of the Ill. Cts.—1984 Ann. Report to the Sup. Ct. of Ill. at 90-92, 177. Given these overwhelming numbers, the reality is that courts simply cannot on a consistent basis indulge in the luxury of granting mid-trial continuances.

Other lesser sanctions suggested by Defendant would have been equally inappropriate and ineffective here. For example, Defendant has suggested that the trial court might have permitted prosecutorial comment on Van's failure to comply with discovery rules. Such a remedy is of doubtful constitutionality.⁶

⁶ First, *Washington v. Texas*, 388 U.S. 14, 22 (1967) has expressly disallowed *a priori* presumptions of untrustworthiness. Second, comment on late testimony might violate due process by diminishing the State's burden of proving guilt beyond a reasonable doubt. See *Cool v. United States*, 409 U.S. 100, 104 (1972).

Moreover, the remedy of prosecutorial comment would be inadequate. Comment on the discovery violation would simply invite the jury to discount the witness's testimony to a random degree, without any basis for knowing the extent of true impeachment that would have occurred, or the area of testimony implicated by that impeachment, had the prosecution been able to investigate the witness. In an analogous situation in *United States v. Nobles*, 422 U.S. 225, 241 (1975), this Court said it perceived no "constitutional significance" in a trial court's decision not to resort to the remedy of prosecutorial comment.

Defendant next suggests that the trial court might have imposed contempt or criminal sanctions against him. (Dft's brief at 19.) However, the admission of defense witness testimony at trial is not a reward to Defendant for having complied with discovery rules; neither is imposition of the preclusion sanction a punishment directed against Defendant. Rather, preclusion is a means of ensuring the integrity of the evidence presented at trial, and of guaranteeing a fair trial to both sides. It is difficult to imagine how admitting the disputed testimony but imposing criminal or contempt sanctions against Defendant or his counsel would have served this end. Hence, this alternative cannot be used as a substitute for preclusion.

In a related argument, Defendant asserts that the preclusion sanction should be prohibited because "it places the entire penalty on the defendant. . . ." (Dft's Br. at 19) This argument rests on three erroneous assumptions. First, it assumes that preclusion is a punishment of Defendant. Second, it assumes that a defendant should not be bound by the acts of his attorney. Third, it assumes that it would be appropriate merely to penalize Defendant's attorney for the discovery violation. All of these assumptions are meritless.

First, as noted above, preclusion is not a punishment of Defendant—or of his counsel—but is merely an aid to the achievement of a fair trial for both the defendant and the State.

Second, Defendant has no basis for severing himself from the tactical choices of his counsel. *Cf. Reed v. Ross*, 468 U.S. 1, 13 (1984) (attorney cannot flout procedural rules on client's behalf, then seek habeas corpus relief in federal court). *See also Murray v. Carrier*, 106 S.Ct. 2639, 2646 (1986) (in context of federal habeas corpus action, defendant is bound by attorney's procedural default unless default was due to external impediment); *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (under civil law, defendant cannot repudiate attorney's conduct). Thus, Defendant here is properly bound by his counsel's conduct regarding compliance with the discovery statute.⁷

Third, although the Illinois discovery sanction statute has been designed in such a way that should the trial court deem it appropriate, it can impose sanctions against an attorney and still admit the challenged evidence,⁸ as

⁷ The question of Vester Van's possible ineffectiveness is not an issue before this Court. This Court expressly declined to review this issue, which Defendant raised in his petition for writ of certiorari. (J.A. 44) However, it should be noted that Defendant has not even attempted to show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment, and that counsel's errors effectively deprived him of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Nor has Defendant overcome the "strong presumption" that Van's conduct, viewed overall, fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

⁸ Illinois Supreme Court Rule 415 provides in relevant part:

Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Ill. Rev. Stat. ch. 110A, § 415(g)(ii) (1985).

noted above, it would not assist here in achieving a fair trial to merely sanction Mr. Van. Admitting the testimony interferes with the People's interest in a fair trial, and sanctioning Mr. Van does not cure that. Only preclusion does.

Lastly, Defendant's argument that the preclusion sanction unjustly "places the entire penalty on [him]" is also inaccurate. First, preclusion is not a penalty; and, secondly, the statute itself permits the judge discretion to impose any appropriate sanctions including admitting the testimony and sanctioning only defense counsel.

In summary, the court did not err in concluding that preclusion was a necessary and appropriate sanction under these circumstances.

3. Materiality And Favorability Of The Excluded Witness To The Defense.

This Court recently held in the context of judging the constitutionality of excluding defense evidence that "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In the case at bar, the excluded evidence can hardly be called material: there is no reasonable probability that the outcome of the trial would have been different had Alfred Wormley's testimony been admitted at trial. Wormley was not a witness to the shooting of Jack Bridges. By reason of the testimony's collateral nature alone, the trial court could have reasonably concluded that Wormley's testimony was not material. Moreover, later testimony showed that

to the extent that Wormley's testimony would have tended to establish that someone in Jack Bridges' family had been armed, this information was supplied by the Algood sisters. Thus, Wormley's testimony would have been cumulative. Defendant himself has admitted that Wormley's testimony was only corroborative of the Algood sisters' testimony. (Dft's Br. at 22, 24)

For these reasons, Wormley's testimony was not material and would not have "substantially enhance[d] 'the search for truth,'" *United States v. Nobles*, 422 U.S. 225, 232 (1975), quoting *Williams v. Florida*, 399 U.S. 78, 82 (1970). Its exclusion, therefore, does not violate Defendant's Due Process rights.

Defendant has argued that the excluded testimony is material as shown by the fact that in the midst of deliberations, the jurors asked to review some of the testimony. Had the jurors been able to review Wormley's testimony, Defendant argues, their verdict might well have been different.

This argument is wholly without merit. To the extent that it is possible to divine anything from the jurors' mid-deliberations query, it appears that the jurors were only attempting to assess the accuracy of Jack Bridges' identification under what were evidently tumultuous circumstances. With regard to Jack Bridges' testimony, the jurors asked to review how many people were chasing Bridges down 64th Street, those peoples' names, and whether Bridges saw the face of the individual whose gun misfired. (R. 399-400)

With regard to Maurice Bethany's testimony, the jurors asked to review testimony regarding "Who ran down the street after Jack after the first shot was fired?" (R. 400)

These questions clearly suggest that the jurors had accepted that one of the group running down 64th Street

after Bridges had shot him. The jurors seemed to question, however, whether Bridges could have picked out his shooter under the riotous circumstances.

Since Wormley did not witness the shooting, his testimony would have been utterly useless in answering this question.

In summary then, because Wormley's testimony was incredible and was cumulative on the question whether Bridges or his family was armed, Wormley's testimony cannot be reasonably viewed as outcome determinative.

4. Evidence Of Bad Faith In The Violation Of The Discovery Rules.

The fourth element to be weighed in judging whether Due Process is offended by excluding a defense witness's testimony is the extent to which defendant's attorney acted in bad faith in violating the discovery rules.

Here, the violation was blatantly egregious. Defendant's counsel, Vester Van, lied to the court when he said he had been unable to locate Alfred Wormley until after trial had begun. He had served Wormley with a subpoena seven days before he made that statement to the court. (J.A. 22) He also lied when he told the prosecutors he would give them pertinent information on Wormley the night before the offer of proof. (J.A. 15) Van's deceitful conduct also extended to the production of the Algood sisters' testimony. Prosecutors complained during the Wormley offer of proof that the addresses Van had supplied for the Algood sisters were burned out buildings, although Van must have known their true addresses since he produced the Algoods at trial.

Hence, Van violated Illinois' discovery rules in bad faith. An attorney's bad faith logically tends to undermine one's

confidence in the veracity of the proffered witness's testimony. In the case at bar, for example, the trial court was confronted with a situation where (1) Wormley's testimony was inherently unbelievable; and (2) Van's contrived tactics made it impossible for the prosecution to investigate that inherently unbelievable testimony.

Van's bad faith thus bolstered the conclusion that Wormley's testimony was untrue and would not have withstood investigation. Thus, while Van's bad faith should not of itself compel the preclusion of Wormley's testimony, Van's bad faith is an appropriate element in evaluating whether Wormley's testimony was untrue and therefore unworthy of admission.

This factor, like the other four, weighs in favor of the State's right to invoke no preclusion sanction in this case.

5. Reciprocal Nature Of State Rule.

Illinois Supreme Court Rule 412 (Ill. Rev. Stat. ch. 110A, § 412 (1985) imposes upon the State discovery obligations commensurate with those imposed upon Defendant by Rule 413. Illinois' discovery statutes are accordingly adequately reciprocal. *Williams v. Florida*, 399 U.S. 78 (1970).⁹

CONCLUSION

Certiorari should be dismissed as improvidently granted in this cause because the issue presented here—whether the trial court was barred by the Compulsory Process

⁹ Illinois Supreme Court Rule 412 provides in pertinent part that "The State shall, upon written motion of defense counsel, disclose to defense counsel . . . the names and last known addresses of persons whom the State intends to call as witnesses. . . ." Ill. Rev. Stat. ch. 110A, § 412(a)(i) (1985).

Clause of the Sixth Amendment from excluding Wormley's testimony—was not raised below.

If this Court reaches the merits of Defendant's claim, however, his compulsory process claim should be rejected because that Clause does not guarantee the admissibility of defense evidence at trial. Even should this Court find that Defendant's Sixth Amendment rights were violated, the State can prove both that any error was harmless beyond a reasonable doubt since there is no reasonable probability that the exclusion of Alfred Wormley's testimony affected the jury's verdict, and that even if the exclusion is evaluated under the due process balancing test, it was not error.

Moreover, Defendant's due process claim, raised below but abandoned here, fails because the State's interest in enforcing its discovery rule as a means of assuring both Defendant and the People of Illinois a fair trial outweighs Defendant's interest in admitting testimony that is cumulative and lacking in credibility.

For all the foregoing reasons, the State respectfully requests that this Court affirm the judgment of the Appellate Court of Illinois for the First Judicial District.

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REPLY BRIEF

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RAY TAYLOR,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
ARGUMENT	
I. THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO QUESTION ITS JURISDICTION BECAUSE THE CONSTITUTIONAL CLAIM NOW BEFORE THIS COURT WAS PROPERLY PRESENTED TO THE ILLINOIS APPELLATE AND SUPREME COURTS	1
II. WASHINGTON V. TEXAS, 388 U.S. 14 (1967) IS BASED ON A FULL ANALYSIS OF THE MEANING OF THE SIXTH AMENDMENT. THE STATE'S BOLD ASSERTION THAT WASHINGTON V. TEXAS AND ITS PROGENY WERE WRONGLY DECIDED IS FRIVOLOUS	5
III. THE BALANCING TESTS PROPOSED BY THE STATE AND THE SOLICITOR GENERAL FAIL TO RECOGNIZE THE FUNDAMENTAL IMPORTANCE OF THE RIGHT TO PRESENT DEFENSE WITNESSES. NO SOUND JUSTIFICATION HAS BEEN PRESENTED FOR THE USE OF THE PRECLUSION SANCTION ..	12
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

<i>Braswell v. Wainwright</i> , 463 F. 2d 1148 (5th Cir. 1972) .	13
<i>Braunskill v. Hilton</i> , 629 F. Supp. 511 (D.N.J., 1986) ..	12
<i>Brooks v. Tennessee</i> , 406 U.S. 606 (1972)	16
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	2, 4, 5, 10, 14, 17
<i>Chappee v. Massachusetts</i> , 659 F. Supp. 1220 (D.Mass., 1987)	12
<i>Cool v. United States</i> , 409 U.S. 100 (1972)	10, 16
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	4
<i>Escalera v. Coombe</i> , 41 Cr. L. Rep. (BNA) 2397 (Fed 2nd Cir. 8/13/87)	12
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	3, 9
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	4-5
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	3
<i>Pennsylvania v. Ritchie</i> , 480 U.S. ____ 94 L. Ed. 2d 40 (1987)	11
<i>People v. Daniels</i> , 75 Ill. App. 3d 35, 393 N.E. 2d 667 (1st Dist. 1979)	17
<i>People v. Osborne</i> , 114 Ill. App. 3d 433, 415 N.E. 2d 1 (4th Dist. 1983)	4
<i>People v. Rayford</i> , 43 Ill. App. 3d 283, 356 N.E. 2d 1274 (5th Dist. 1976)	2, 4
<i>Picard v. Connor</i> , 404 U.S. 270 (1971)	2, 4
<i>Rock v. Arkansas</i> , 483 U.S. ____ 97 L. Ed 2d 37 (1987)	10, 11-12
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	3
<i>United States v. Burr</i> , 25 F. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807)	9
<i>United States ex rel. Enoch v. Hartigan</i> , 768 F. 2d 161 (7th Cir. 1985), cert. denied, 106 S. Ct. 1281 (1985),	3
<i>United States ex rel. Robinson v. McGinnis</i> , 593 F. Supp. 175 (C.D. Ill. 1984), aff'd mem., 753 F. 2d 1078 (7th Cir.), cert. denied, 471 U.S. 1116 (1985)	12-13
<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858 (1982)	11
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973)	15
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	2, 3, 6, 16
<i>Webb v. Texas</i> , 388 U.S. 95 (1972)	11
<i>Webb v. Webb</i> , 451 U.S. 493 (1981)	2, 4
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	15

Table of Authorities Continued

Page

STATUTES:

28 U.S. C. S. § 1257(3) (1966)	1
Md. Dec. of Rts., art. XIX (1776)	7

MISCELLANEOUS:

Clinton, <i>The Right to Present A Defense: An Emergent Constitutional Guarantee in Criminal Trials</i> , 9 Ind. L. Rev. 711 (1976)	7, 9-10, 14, 16, 17
Westen, <i>The Compulsory Process Clause</i> , 73 Mich. L. Rev. 71 (1974)	8, 14
8 J. Wigmore § 219, at 68-70 (rev. ed. J. McNaughton, 1961)	9

I. THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO QUESTION ITS JURISDICTION BECAUSE THE CONSTITUTIONAL CLAIM NOW BEFORE THIS COURT WAS PROPERLY PRESENTED TO THE ILLINOIS APPELLATE AND SUPREME COURTS.

The State of Illinois concedes that a proper federal claim was preserved under the Due Process Clause of the Fourteenth Amendment. (St. Br. 15, 47) The State further recognizes that the Compulsory Process Clause of the Sixth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. (St. Br., 16) In addition, the State makes no assertion that the substance of the federal claim raised below is in any way different from the substance of the claim raised in this Court. Nevertheless, for the first time in its brief on the merits, the State argues that this Court is without jurisdiction because the right sought to be vindicated was not "specially set up or claimed under the Constitution" as required by 28 U.S.C.S. § 1257(3).¹ The State's argument is based wholly on the fact that the petitioner in his Illinois Appellate Court brief failed to expressly cite to the Compulsory Process Clause or the Sixth Amendment. (St. Br., 15-6)² For the reasons set forth below, the State's argument is totally without merit.

¹ In a footnote to his *Amicus* brief, the Solicitor General also argues that the "petitioner has failed to preserve his Compulsory Process claim." (S.G. Br. 8-9, n.2) The same reasons for rejecting the State's argument apply to the Solicitor General's assertions.

² The State also claims that the Sixth Amendment was not cited in the petitioner's Petition for Leave to Appeal in the Illinois Supreme Court. (St. Br., 6) This is simply not true. See Pet.'s Petition for Leave to Appeal, 6. Also, after this Court granted certiorari, the Illinois Supreme Court entertained an application for bond. After hearing the State's objections, the Illinois Supreme Court ordered that Mr. Taylor be admitted to bail on May 12, 1987.

Jurisdiction of this Court "can arise only if the record as a whole shows either expressly or by implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-7 (1981). It is essential "that the substance of a federal * * * claim must first be presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 278 (1971).

In the present case, the substance of the federal constitutional claim presented to the State courts and to this Court is whether the State's exclusion of a defense witness, solely as a sanction for a discovery violation, was prohibited by the Sixth Amendment right of the petitioner to present witnesses as applied to the states by the Due Process Clause of the Fourteenth Amendment. Then, as now, the petitioner relies upon *Washington v. Texas*, 388 U.S. 14 (1967), and *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Washington v. Texas held that "the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *id.*, 17-18, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *id.*, 19. *Chambers v. Mississippi* reiterated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302.

Appropriately, the petitioner's Illinois Appellate Court argument relied upon the following quotation from *People v. Rayford*, 43 Ill. App. 3d 283, 286-7, 356 N.E. 2d 1274 1277 (5th Dist., 1976):

"... The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. 'Few rights are more fundamental than that of an accused to present witnesses in his own defense.' *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297, 308." (Pet.'s Ill. App.Ct. Br. at 29)

Indeed, as the Solicitor General's brief recognizes (S.G.Br., 16, n.9) *People v. Rayford* itself is a case grounded on the Compulsory Process Clause. In addition, the Sixth Amendment component of the fundamental right was reiterated in the petitioner's reply brief and in his petition for rehearing. (Pet.'s Ill. App. Ct. Reply Brief, 6-8; Pet.'s Ill. App. Ct. Reh. Pet., 1-4) Both relied upon *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir., 1985), *cert. denied*, 106 S.Ct. 1281 (1986),³ a case out of Illinois affirming habeas corpus relief on the ground that exclusion of a defense witness as a discovery sanction violated the Compulsory Process Clause.

"[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The State's belated attempt to treat the Sixth Amendment right to present defense witnesses as a distinct right from that found in the Fourteenth Amendment elevates form over sub-

³ The reply brief relied upon the lower court's holding in *United States ex rel. Enoch v. Lane*, 581 F. Supp. 423 (N.D. Ill., Ed., 1984). The Seventh Circuit's affirmance was later cited by leave of court as additional authority.

stance. Here, the substance of the federal claim presented to the State courts and to this Court is the same.

To preserve a federal claim in state courts, it is not necessary to cite "book and verse on the federal constitution," *Picard v. Connor*, 404 U.S. 270, 278 (1971), or to precisely identify the provisions of the constitution relied upon. *Webb v. Webb*, 451 U.S. 493, 501 (1981). See e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 113-4, n.9 (1982). Indeed, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court held that Confrontation Clause and Compulsory Process Clause claims were both preserved by reliance upon the Due Process Clause in the state courts. *id.*, at 305-306, n.3. Thus, the claim in the present case was clearly and adequately raised below.

It is true that the Illinois Appellate Court did not directly address the constitutional nature of the claim in passing on the issue. (J.A., 38-9) However, recognition of the constitutional claim by the court may be inferred from the fact that it cites one case, *People v. Osborne*, 114 Ill. App. 3d 433, 415 N.E. 2d 1 (4th Dist., 1983), in ruling on the witness exclusion issue. *People v. Osborne* reversed a conviction in reliance on *People v. Rayford*, *supra*, holding that "[i]t is a fundamental right of a defendant to present his theory of the case" and that exclusion of an alibi witness violated that right. 114 Ill. App. 3d at 437. The inference that the court implicitly passed on the constitutional claim is buttressed by the fact that the petitioner relied upon *People v. Osborne*, *supra*, in his reply brief. (Pet.'s Ill. App. Ct. Reply Br., 6-8)

In any event, even if the Illinois Appellate Court did not decide the federal question, the petitioner has properly preserved the claim for this Court's jurisdiction by adequately raising the claim in the State courts. *Illinois v.*

Gates, 462 U.S. 213, 218, n.1 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 305-6, n.3 (1973); *Martinez v. California*, 444 U.S. 277, 282, n.6 (1980).

Finally, there can be no dispute that, as in *Stanley v. Illinois*, 405 U.S. 645, 658, n.10 (1972), the Court here will "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the State court."

For the reasons stated, certiorari was properly granted and the case should be decided on the merits.

II. WASHINGTON V. TEXAS, 388 U.S. 14 (1967) IS BASED ON A FULL ANALYSIS OF THE MEANING OF THE SIXTH AMENDMENT. THE STATE'S BOLD ASSERTION THAT WASHINGTON V. TEXAS AND ITS PROGENY WERE WRONGLY DECIDED IS FRIVOLOUS.

The State posits that "[i]n our view, the Compulsory Process Clause of the Sixth Amendment, properly interpreted, guarantees only that defendants have subpoena power to produce witnesses." (St. Br., 18) However, *Washington v. Texas*, 388 U.S. 14 (1967), firmly established that the Compulsory Process Clause includes the fundamental right to present defense witnesses. (See, e.g. S.G. Br. 11) Nevertheless, the State then presents an analysis of the history and construction of the Compulsory Process Clause (St. Br., 21-29) which purports to legitimize its views that (1) *Washington v. Texas*, 388 U.S. 14 (1967) was wrongly decided, and (2) that in any event, "this Court's jurisprudence [in cases decided since *Washington v. Texas*] recognizes that the Compulsory Process Clause guarantees process alone, and evidentiary questions, if constitutional, are due process concerns." (St.Br., 29)

These views are fallacious for a number of reasons. The petitioner will respond to them in turn without belaboring the obvious.

The State argues that *Washington v. Texas* and its progeny "erroneously stretched the Compulsory Process Clause to protect the admissibility of defense testimony" and that a "careful analysis of the language and history of the Clause, however, demonstrates . . . that the Clause assures only that defendants are afforded the subpoena power that they lacked at common law." (St.Br., 20) What this argument ignores is that Chief Justice Warren's virtually unanimous opinion⁴ in *Washington v. Texas* contains a careful analysis of the language and history of the clause which fully supports the Court's interpretation of it. See 388 U.S. at 18-23. For example, the opinion at 388 U.S. 19 states:

Joseph Story, in his famous Commentaries on the Constitution [3 Story, Commentaries on the Constitution of the United States §§ 1786-1788 (1st ed. 1833)], observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.

The Court's astute analysis should be dispositive of this issue. The State's purported analysis, on the other hand, completely overlooks the historical reasons for the enactment of the Clause. Instead, it attempts to demonstrate that James Madison chose narrow wording in drafting the

⁴Justice Harlan's concurring opinion did not question the majority's interpretation of the Sixth Amendment. It simply restated his view that the specific provisions of the Bill of Rights are not incorporated in the Fourteenth Amendment. 388 U.S. at 21-2.

Clause to win the support of States which had charters calling only for the subpoena power right. (St.Br. 21-3)

In support of this assertion, the State cites as the most narrowly drafted state constitutional provision, the Maryland Declaration of Rights, art. XIX (1776), which the State claims "simply afforded a defendant the right 'to have process for his witnesses.'" (St.Br., 22) However, a full reading of the Article demonstrates that Maryland's concern for the right to present defense witnesses was as deep and broad as that of any other founding State:

XIX. That, in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; *to examine the witnesses, for and against him, on oath*; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty. (emphasis added)

Md. Dec. of Rts. art. XIX (1776), reprinted in Clinton, *The Right to Present A Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 729 (1976) (Clinton).

Thus, the State's claim that the Framers of the Bill of Rights intended a narrow and restrictive interpretation of the Compulsory Process Clause is utterly without foundation.

Nevertheless, the State (St.Br. 23-4) points to the single mention of the Compulsory Process Clause made during the entire two-and-a-half year debate over the Bill of Rights in the first Congress claiming that this exchange "conveys in straightforward fashion that the Clause guar-

antees subpoena power only" (St.Br., 24) A fairer reading of the meaning of the exchange is found in Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 98 (1974) (Westen):

The Clause was mentioned only once in the record: Representative Burke of South Carolina moved that it be amended to guarantee the accused the right to a continuance of his trial if his subpoenas for his material witnesses were not served. The proposal was rejected as superfluous on the ground that the courts could be trusted to construe the clause to achieve its intended (but unarticulated) purposes.

The State has failed to grasp that when Representative Hartley stated that "the remainder must lie in the discretion of the court," he certainly did not mean to imply that that discretion had no constitutional limits.

The final historical documents the State relies on are Chief Justice Marshall's opinions in the trial of Aaron Burr. (St.Br., 25) However, a close analysis of this authority⁵ also refutes the State's position that "[t]he text of the [clause] is convincingly dispositive" of its meaning. (St.Br. 23) In the Burr trials, the government objected to Burr's subpoena of a letter written by General Wilkinson to President Jefferson on the ground that the "process" under the Sixth Amendment extends only to "witnesses" for the defense, and not to their papers. Under the State's analysis in the present case, this view ought to have prevailed. However, Chief Justice Marshall rejected the "literal distinction" made by the government as "too much attenuated to be countenanced by in the tribunals of a just

⁵ Westen believes that Chief Justice Marshall's opinions "gave a sweeping construction to the compulsory process clause. . . ." Westen, *id.* at 101.

and humane nation." *United States v. Burr*, 25 F. Cas. 30, 35 (No.14,692d) (C.C.D. Va. 1807). Thus, shortly after the Clause was adopted the leading constitutional jurist of the day recognized that it was not to be read so literally as to defeat its purposes.

Not surprisingly, the authority upon which the State relies does not support its ill-conceived position. (St.Br., 20) What is remarkable is that, aside from 8 J. Wigmore § 2191, at 68-70 (rev. ed. J. McNaughton 1961),⁶ the State relies on Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 767 (1976)⁷ (St.Br. 20).

Clinton's article, far from supporting the State's interpretation of the Compulsory Process Clause, supports the petitioner. Clinton wrote in a last-gasp effort to stave off the "incorporation" doctrine, now firmly entrenched, which holds that provisions of the Bill of Rights which are fundamental and essential to a fair trial are "made obligatory upon the States by the Fourteenth Amendment." *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)

Clinton feared that premising the right to defend on the Sixth Amendment alone would diminish that right because "[t]he Framers of the Bill of Rights never envisioned the development of [modern procedural] difficulties [for the defense] and therefore did not provide

⁶ Wigmore lends no support to the State's position. It does not even discuss the question that *Washington v. Texas* answered, a question which had never been addressed by the Court when the treatise was written. Its conclusion that the Clause guarantees the right to have depositions taken, *id.* at 70, and its reliance on a case holding that an accused charged with contempt is entitled to produce witnesses, *id.* at 20, n.6, indicate support for the petitioner not the State.

⁷ Nothing on page 767 supports the State's position.

express protection against them." Clinton, at 714. Thus, Clinton sought to insure that the fundamental right would find protection from an overly-narrow construction of the Sixth Amendment. Ironically, that overly-narrow construction is the very one the State now proposes.

Furthermore, Clinton believed that "*Washington* [v. *Texas*] was easy to decide on sixth amendment principles" because "the precise issue framed in *Washington* lent itself readily to analysis under the compulsory process clause." *Id.* at 768-9. This was because the witness in *Washington* was totally precluded from testifying. Clinton was concerned that the Clause would not protect an accused from partial exclusions of a witness' testimony.⁸

However, in the context of the present case, Clinton left no doubt that the Compulsory Process Clause affords the defendant full protection. In discussing notice-of-alibi and other discovery rules which call for the use of the preclusion sanction, Clinton opined that they are facially unconstitutional, *id.* at 833, 838. Clinton observed:

In light of *Washington*, cases arising under alibi-notice rules can usually be easily resolved utilizing a sixth amendment compulsory process analysis together with the incorporation doctrine where necessary. Since the testimony of the alibi witness is *totally* excluded, there is a close analogy to *Washington*. *id.* at 832, n. 564.

This review of the State's claim that *Washington* v. *Texas* was wrongly decided demonstrates that there is no basis for the State's argument.

⁸ Clinton's fear was groundless. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Cool v. United States*, 409 U.S. 100, 104 (1972); *Rock v. Arkansas*, 483 U.S. ___, 97 L. Ed. 2d 37 (1987).

Finally, the State claims that cases decided since *Washington* v. *Texas* have abandoned its Compulsory Process Clause analysis in favor of (an apparently separate) Due Process Clause analysis. (St.Br., 27-29)⁹ The State has simply misread the cases it relies upon.

Webb v. Texas, 388 U.S. 95, 98 (1972) relies entirely on *Washington* v. *Texas*' Compulsory Process Clause analysis.

United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982), did not back off of Compulsory Process Clause analysis. Rather, it simply held that the Clause is not violated where a defendant fails to show that the sought-after witness has evidence "in his favor."

The State itself acknowledges that in *Pennsylvania v. Ritchie*, 480 U.S. ___, 94 L. Ed. 2d 40 (1987), the Court concluded that "the Clause established at a minimum . . . that defendants have the right to put before the jury evidence that might influence the question of guilt." (St.Br., 28) We ask for nothing more here.

Similarly, in *Rock v. Arkansas*, 483 U.S. ___, 97 L. Ed. 2d 37, 47-49 (1987), the Court analyzed the case wholly from the perspective of *Washington* v. *Texas* and *Chambers v. Mississippi*, 410 U.S. 284 (1973), two "Compulsory

⁹ Throughout its brief, the State takes great pains to make this distinction. The reason such a distinction should be made is never directly presented by the State. The reason the State wants such a distinction is abundantly clear in all four arguments it presents. The only logical reason that the petitioner can think of as to why the distinction should be made would be that the right to present defense witnesses is not really the fundamental and essential right we all thought it was. Apparently, the State is reluctant to make this assertion.

Process Clause decisions." 97 L. Ed. 2d at 54 (Rehnquist, C.J., dissenting.)

Therefore, there is no support for the State's claim that this Court is not recognizing the Compulsory Process Clause right asserted in the instant cause.

The State's Argument II should be summarily rejected.

III. THE BALANCING TESTS PROPOSED BY THE STATE AND THE SOLICITOR GENERAL FAIL TO RECOGNIZE THE FUNDAMENTAL IMPORTANCE OF THE RIGHT TO PRESENT DEFENSE WITNESSES. NO SOUND JUSTIFICATION HAS BEEN PRESENTED FOR THE USE OF THE PRECLUSION SANCTION.

Neither the State nor the Solicitor General have presented any valid constitutional justification for the employment of the preclusion sanction as a tool to enforce discovery rules. Their arguments that lesser sanctions may be inadequate (St.Br., 39-43; S.G.Br., 17-20) completely ignore the impact of one sanction which was preliminarily employed in the present case and which is enumerated in the Illinois discovery rules: the court may order full disclosure of the testimony sought to be introduced. This sanction, when used in conjunction with the other sanctions short of preclusion, will invariably remedy the harm done by a discovery violation.

Moreover, the holdings in the various cases employing a balancing test—that preclusion was unconstitutional—strongly suggest that preclusion is simply not a viable sanction in light of the Sixth Amendment. See, e.g., *Escalera v. Coombe*, 41 Cr.L. Rep. (BNA) 2397 (Fed. 2nd Cir., Aug. 13, 1987); *Chappee v. Massachusetts*, 659 F. Supp. 1220 (D.Mass. 1987); *Braunskill v. Hilton*, 629 F. Supp. 511 (D.N.J., 1986); *United States ex rel. Robinson*

v. McGinnis, 593 F. Supp. 175 (C.D. Ill., 1984); and cases cited in Pet.'s Br. at 20-1. Thus, it is clear that use of the preclusion sanction will violate the constitution in almost every case.

Furthermore, if this Court chooses to determine that the preclusion sanction may withstand constitutional scrutiny in the rare case, it should make it clear that the sanction may only be employed where the accused has made a knowing and intelligent waiver, or its equivalent, of his right to present the excluded witness. *Braswell v. Wainwright*, 463 F. 2d 1148, 1155 (5th Cir., 1972) ("Where the defendant has been advised of his constitutional right and there has been a knowing intelligent waiver by the defendant, exclusion would be permissible. And perhaps the consent, procurement, or knowledge on the part of defendant or his counsel might rise to the level of a waiver and thus render exclusion proper.").

All of these considerations show that preclusion is a constitutionally infirm sanction for discovery violations.

However, all parties are in agreement that if the sanction is to be available, a balancing test must be employed to determine its appropriate use. (St. Br., 36; S.G.Br., 22-6) Because the tests proposed by the State and by the Solicitor General are radically different,¹⁰ their inadequacies will be addressed separately here.

The State claims to rely on a "due process balancing test that has evolved since *Chambers v. Mississippi*, 410 U.S. 284 (1973)]." (St. Br., 36) However, the State cites no authority which has ever adopted or applied the five--

¹⁰ The difference stems from the State's fundamental error in refusing to recognize that the issue is governed by the Sixth Amendment. (See St. Br., Arg. II)

pronged test it then propounds. A brief analysis of the State's test demonstrates its fatal inadequacies.

Foremost among these is the State's refusal to acknowledge that any balancing test must be premised on a presumption against exclusion in order to give appropriate recognition to the fact that the "denial or significant diminution" of the fundamental right to present witnesses "calls into question the ultimate integrity of the fact-finding process." *Chambers* at 295. Put another way, this presumption against exclusion puts the burden on the State to demonstrate "a compelling or legitimate interest" in the abridgment of the right. See Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 798-801 (1976); Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 145-6, n.n. 200-1 (1974).¹¹

The test proposed by the State utterly fails to consider the importance of the right as an independent factor. Westen, at 130, effectively argued the inadequacy of the State's test on this score:

This test encourages courts to decide cases by lumping all of the facts together without identifying issues of particular importance or giving particular weight to the interests involved. It encourages decisions limited explicitly to their facts, rather than opinions containing useful guidelines for future cases.

This flaw alone is sufficient reason to reject the State's proposed test. Other major flaws are that one of the five

¹¹ Westen stated: "Broadly construed, [*Chambers*] appears to recognize that the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth." *id* at 151-2.

factors is irrelevant and that a critical factor is completely overlooked.

The fifth factor in the State's balancing test is "an assessment of whether a state's discovery statutes are reciprocal." (St.Br., 36) Given that such reciprocity is constitutionally mandated, *Wardius v. Oregon*, 412 U.S. 470 (1973), *Williams v. Florida*, 399 U.S. 78 (1970), it is preposterous to suggest that mere compliance with this constitutional requirement should be a factor favoring use of the preclusion sanction.

The factor which the State's test fails to include is consideration of the existence and quantum of prejudice to the State's case if only lesser sanctions are applied. This factor would seem to be the most critical one based on the foregoing analysis. Yet the State's test fails to include this vital factor.

In light of these major flaws, the State's proposed balancing test must be rejected.

The Solicitor General's proposed test, while far more acceptable than the State's, also contains the fatal flaw of overlooking the presumption against preclusion. (S.G. Br., 23) In fact, the Solicitor General would have the trial court "weigh the need for exclusion against the defendant's opportunity to present a defense and should attempt to tailor the remedy to the wrong," (St. Br., 23) whereas a recognition of the presumption would require the court to seek a remedy least restrictive of the Sixth Amendment right. Thus, the test is unacceptable.

In addition, the Solicitor General suggests two other inappropriate "practical considerations" as guides to the court's determination: an assessment of witness credibility and a presumption that counsel's failure to comply

with discovery rules is chargeable to the accused. (S.G. Br., 24-6)

This Court's jurisprudence is dispositive of the credibility issue. The Court has consistently held that, in assessing a claimed Sixth Amendment violation, the credibility of the witnesses is best left to the judgment of the jury in our adversary system. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Brooks v. Tennessee*, 406 U.S. 605, 611 (1972); *Cool v. United States*, 409 U.S. 100 (1972). Therefore, consideration of the credibility of the proposed testimony has no place in the determination of whether the evidence will be admitted.

As to the Solicitor General's suggestion that the trial court impute counsel's misdeeds to the accused, such an approach is completely inappropriate. Not only will it lead to excessive litigation, it is likely to cause many injustices because ineffective assistance of counsel claims are seldom given the treatment they deserve. (See *Clinton*, *id* at 837, n. 588, and *J. A.*, 41-2)

For these reasons, the Solicitor General's proposed test should not be adopted.

Rather, the test suggested in our original brief (Pet.'s Br., 21) is the appropriate balancing test. The remainder of this brief will address the factors critical to the present case.

The State insists that less severe sanctions would not have been effective. (St. Br., 39-43) However, the State refuses to recognize the impact of a lesser sanction which was employed in the present case before preclusion was adopted. The sanction was that full disclosure of the testimony sought to be admitted was made to the State which even was allowed to cross-examine the proposed witness. In the circumstances of this case, that sanction was more

than adequate. Employment of that sanction also demonstrates that another factor, prejudice to the State, weighed heavily in the petitioner's favor. (See Pet.'s Br. 21-2 and, e.g., *People v. Daniels*, 75 Ill. App. 3d 35, 43, 393 N.E. 2d 667 (1st Dist. 1979) (State not prejudiced by admission of late witness' testimony where rebuttal of such testimony reposed in State's chief witness.))

The State also claims that Mr. Wormley's testimony was not material to the defense because it was cumulative to the testimony of the Algood sisters. (St. Br., 43-4) The State fails to recognize that in a credibility contest which poses four prosecution witnesses against two defense witnesses, the addition of a third defense witness, far from being cumulative, may well be crucial to the outcome. In this regard, it should be noted that the excluded evidence in *Chambers v. Mississippi*, 410 U.S. 204 (1973) was "arguably cumulative, albeit critical, defense testimony" and this Court did not hesitate to find it material. (See *Clinton*, *id* at 791-2) It is difficult to understand why, if Wormley's testimony was of such little worth, the prosecutors jeopardized their entire case by insisting to the trial court that he should not be heard.

The final factor to be considered, counsel's wilfulness, adds nothing to the argument in support of preclusion. The record here more than adequately demonstrates that defense counsel, far from being a grand strategist with a sinister design to thwart the jury's attempt to determine the truth, was actually an unprepared lawyer who was unable to cope with the massive advantages the prosecution possessed.

The record shows that the State had twenty two months to gather witnesses and prepare its case before it even bothered to inform Mr. Taylor of the charge against him.

(R.457) Counsel was hired several months later and Mr. Taylor remained incarcerated for several months after that. (R.445, 452-3) Counsel faced almost insurmountable difficulties in attempting to locate witnesses due to the delay in bringing the prosecution.¹² (J.A. 14, 16) Counsel was so unnerved by his posture in the proceedings that he failed to introduce prior convictions of all four State eye-witnesses, evidence which would have been devastating to their credibility. (R.120-1, 129, 232, 336-B; J.A. 41)

Yet the State and the Solicitor General would have this Court believe that counsel's failure to comply with a discovery rule designedly gained an unfair advantage for the petitioner. It is sufficient to say that, while counsel was surely evasive in attempting to explain why he had not complied with the rule, it is plainly apparent that counsel was not doing so to gain any advantage for the petitioner.¹³

The "bad faith" argument put forward by our opponents is simply without merit and, in any event, is not dispositive of the issue before this Court.

¹² The State, on the other hand, was unable to find any witnesses in its favor unrelated to the complainant despite its timely investigation and the fact that there were 25-30 eyewitnesses to the shooting.

¹³ In an astounding statement, the State asserts that the petitioner has not attempted to demonstrate ineffective assistance of counsel. (St. Br., 42, n.7) If this is an invitation to this Court to consider the issue as plain error, the petitioner more than welcomes such review based on the argument presented in his certiorari petition.

CONCLUSION

For the foregoing reasons, the petitioner requests that the judgment of the Appellate Court of Illinois be reversed.

Respectfully submitted,

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